Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

E-L ENTERPRISES, INC.

Petitioner,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the government pump out and permanently take a landowner's groundwater without paying just compensation under the Fifth Amendment?

2. If the taking of groundwater will cause a landowner's building to collapse due to the permanent lowering of the natural water level, is just compensation calculated as the reduction in the value of the property due to the taking, or only the value of the actual physical water taken?

PARTIES TO THE PROCEEDING

All parties to this petition are listed in the caption.

Petitioner, E-L Enterprises, Inc., a Wisconsin business corporation ("E-L"), was the plaintiff and appellee below.

Respondent, Milwaukee Metropolitan Sewerage District ("MMSD"), was the defendant and appellant below. MMSD is a regional government agency within the City of Milwaukee established by state law.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petitioner states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
RULE 29.6 STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS 2
STATEMENT OF THE CASE 3
REASONS TO GRANT THIS PETITION 7

I. The Wisconsin Supreme Court's Decision Directly Conflicts With Case Law Of The Supreme Court Of The United States 9

II. The Wisconsin Supreme Court's Decision Directly Conflicts With Other State Supreme Courts 14

CONCLUSION 19

APPENDIX

E-L Enterprises, Inc. v. MMSD, 2010 WI 58, 785 N.W.2d 409 ..... App.1:1-1:51

E-L Enterprises, Inc. v. MMSD, 2009 WI App 15, 763 N.W.2d 231 ..... App. 2:1-2:20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Dugan v. Rank, 372 U.S. 609 (1963) ..9, 10, 11, 12, 13

Hensley v. City of Columbus, 433 F.3d 494 (6th Cir. 2003).....15

Int'l Paper Co. v. U.S., 282 U.S. 399 (1931) 10, 11

Peabody v. U.S., 231 U.S. 530, 538 (1913) 9, 10

STATE COURT CASES

Cline v. Am. Aggregates Corp., 474 N.E.2d 324 (Ohio 1984) 15

Collier v. Merced Irr. Dist., 2 P.2d 790 (Cal. 1931) 12, 17

Eberle v. Dane County Bd. of Adj., 595 N.W.2d 730 (Wis. 1999).....16

McNamara v. Rittman, 107 Ohio St. 3d 243,2005-Ohio-6433, 838 N.E.2d 640.....14, 15, 16

MMSD v. City of Milwaukee, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 8

Wisconsin v. Michels Pipeline Constr., Inc., 217 N.W.2d 339 (Wis. 1974).....5, 7, 8, 13, 15

PETITION FOR A WRIT OF CERTIORARI

E-L Enterprises, Inc. respectfully petitions this Court for a writ of certiorari to review the underlying decision of the Supreme Court of Wisconsin in this case.

OPINIONS BELOW

The Milwaukee County Circuit Court entered judgment on a jury verdict in favor of E-L, dated March 11, 2008, in Case No. 2004-cv-5505.

MMSD appealed the circuit court's decision. The opinion of the Wisconsin Court of Appeals, dated December 23, 2008, affirmed the circuit court. Its decision is reported as *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2009 WI App 15, 316 Wis. 2d 280, 763 N.W.2d 231. It is reprinted in the Appendix at App. 2:1 through App. 2:20.

MMSD appealed the appellate decision. The opinion of the Supreme Court of Wisconsin, dated July 2, 2010, reversed the appellate court. Its decision is reported as *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, 785 N.W.2d 409. It is reprinted in the Appendix at App. 1:1 through 1:51.

STATEMENT OF JURISDICTION

The Supreme Court of Wisconsin issued its decision in this case on July 2, 2010. E-L's petition to this Court must be filed by September 30, 2010. The state court decided an important federal

question in a way that conflicts with established law of this Court. *See* Supreme Court Rule 10(c). The Petitioner's case may be reviewed by this Court because the Supreme Court of Wisconsin interpreted the United States Constitution in reaching its decision. The decision incorrectly interprets the Constitution based upon existing decisions of this Court.

The Wisconsin Court's decision also conflicts with rulings of other state supreme courts and the United States Court of Appeals for the Sixth Circuit. *See* Supreme Court Rule 10(b). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because E-L has invoked its rights and privileges under the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides, in part:

> Nor shall private property be taken for public use, without just compensation.

That provision is applicable to the State of Wisconsin through the Fourteenth Amendment, which provides, in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background

E-L owns a building in downtown Milwaukee. (Appendix, hereinafter "App." 1:5-1:6 at ¶ 7.) Due to Milwaukee's vicinity to Lake Michigan, many downtown buildings were constructed on wood piles, which in turn support their foundations. The wood piles under E-L's building are sufficiently durable to support the building as long as they remain saturated with groundwater. (*Id.*) Since 1928, the piles had remained sufficiently saturated and supported the building without any problems. (*Id.*)

In the late 1980s, MMSD constructed a 19-mile system of sewers under Milwaukee for the removal of overflow sewer water. (*Id.* 1:5 at ¶ 6.) To properly lay the sewer pipes in trenches, MMSD determined that the trenches had to be dry and decided to pump groundwater from the trench that would hold the sewer system. (*Id.* 1:6 at ¶ 8.) One trench was directly adjacent to E-L's building. (*Id.* 1:5 at ¶ 7.) MMSD knew that E-L's building was supported by wood piles, the piles needed to be saturated, and the removal of the groundwater would lead to rotting of the piles. (App. 2:9 at ¶ 10.)

For 17 days, MMSD pumped and removed massive amounts of groundwater to keep the trench dry. (*Id.* 1:6 at ¶ 8.) MMSD decided not to replace the groundwater with recharging wells at a cost of approximately $25,000 (which it had done at other locations) or take other steps that would have

avoided its taking of the groundwater.[1] MMSD knew it was substantially lowering the groundwater levels in the area of E-L's building from MMSD's monitoring of the groundwater levels the area from the devices it had installed in the area called piezometers. MMSD never told E-L that the groundwater levels were being substantially lowered. (App. 2:19-2:20 ¶ 23.)

After MMSD's removal of the groundwater, E-L noticed cracking and settlement in the foundation of its building on its property. (App. 1:6 at ¶ 9.) E-L hired an engineer to determine the cause of the foundational problems. He determined that MMSD's removal of the groundwater from E-L's property caused a substantial permanent decrease in the groundwater level. (*See id.* 1:6 at ¶ 9.) The absence of water to saturate the wood piles caused them to dry out, rot, and fail to provide the strength necessary to support the building. (*Id.* 1:18 at ¶ 26.) To prevent the entire side of the building from collapsing, E-L was forced to saw off the rotted portions of the wood piles, replace them with concrete and take other corrective measures to the wall and support system of the building at a cost of over $300,000. (*Id.* 1:10 at ¶ 13.)

It is undisputed that the groundwater removal (i) significantly reduced the water level permanently on E-L's property and (ii) caused 14 wood piles to rot underneath E-L's building, forcing E-L to incur costs of over $300,000 to prevent the building from collapsing. (*Id.* 1:6 at ¶ 9.)

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[1] (*See* Record submitted to the Wisconsin Court, not duplicated for purposes of this petition.)

II. Procedural History

At trial, a jury determined that MMSD's removal of groundwater was an unreasonable use of the groundwater and was a taking that caused E-L's building to settle. (*Id.* 1:10 at ¶ 13.) The trial court instructed the jury for a partial taking that tracks Fifth Amendment law. (App. 2:3, 2:6 at ¶¶ 4, 7.) The amount of just compensation was determined by using the value of the property before the taking, less the value of the property after the taking. The jury awarded $309,388 to E-L "for the taking of groundwater," which represented E-L's cost to restore the building to its condition before the taking. (App. 1:10 at ¶ 13.)

MMSD appealed, and the court of appeals affirmed the judgment in favor of E-L. Citing *Wisconsin v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302-303, 217 N.W.2d 339, 350-351 (1974), the three judge panel held that Wisconsin law recognizes E-L's interest in groundwater and that MMSD's diversion of that groundwater constituted a compensable taking. (App. 2:11 at ¶ 11.)

MMSD appealed to the Supreme Court of Wisconsin ("Wisconsin Court"). In granting the petition for review, the Wisconsin Court also ordered the parties to address "whether [MMSD's] conduct constituted a taking under the U.S. Constitution." (App. 1:2 at ¶ 4 n. 2.) In its ruling, the Wisconsin Court made the following findings of fact and conclusions of law relevant to this Court's decision to review this case:

(a) MMSD took groundwater; but because E-L introduced no proof as to the value of *the extracted*

groundwater itself, there was no need to determine either the amount of just compensation, or whether E-L actually owned the groundwater (*Id.* 1:16-1:17 at ¶ 24); and

(b) Because MMSD did not "physically occupy the property" and no government restriction deprived E-L of "all, or substantially all, of the beneficial use" of E-L's property, E-L's damages are merely "consequential damages to property resulting from government action, which are not compensable" under the Wisconsin or U.S. Constitutions. (*Id.*)

The Wisconsin Court reversed a jury verdict resulting from an instruction on fair compensation for a partial taking that follows the holdings of the United States Supreme Court and the Wisconsin Court. (*Id.* 1:46 at ¶ 63.) The Wisconsin Court ruled that E-L's recovery was only the value of extracted groundwater taken by MMSD—not diminution of property value due to a partial taking. However, because E-L offered no evidence of the value each bucket of groundwater taken, the Wisconsin Court held that E-L failed to prove any loss. (*Id.* 1:3 at ¶ 5.) The Wisconsin Court did not remand the case to determine the value of the groundwater taken based upon its reversal of the jury verdict.

E-L believes that MMSD's undisputed permanent taking of the groundwater on E-L's property is a compensable "taking" that reduced the value of E-L's property. (*Id.* 1:47 at ¶ 64.) E-L now respectfully petitions this Court for a writ of certiorari to review the opinion of the Wisconsin Court.

REASONS TO GRANT THIS PETITION

The underlying decision of the Wisconsin Court turns "takings" jurisprudence on its head. The Wisconsin Court repeatedly stated that if E-L should be compensated at all, such compensation would be limited to the "value of the extracted groundwater" itself, of which E-L submitted no direct proof. (*See* App. 1 at ¶¶ 5, 9, 25, 28, 29, 41.) And, because E-L submitted no proof as to the value of each gallon of water that was permanently taken, the court decided it was not necessary to determine the extent of E-L's property rights in the groundwater. (*Id.* 1:16-1:17 at ¶ 24.)

The result of the Wisconsin Court's logic disregards the concept of "just compensation" and established principles of the Fifth Amendment. The holding effectively eliminates the ability of all Wisconsin property owners to be justly compensated for partial governmental takings and also gives MMSD the absolute ability to seize and control a valuable natural resource of private property owners—without any meaningful consequence.

Wisconsin law recognizes a property owner's interest in groundwater. *Michels Pipeline*, 63 Wis. 2d 278, 302-303, 217 N.W.2d 308, 350-351 (holding that a party is liable for damages if his withdrawal of groundwater "causes unreasonable harm through lowering the water table or reducing artesian pressure" of his neighbor). The Wisconsin Court of Appeals recognized the right, and the Wisconsin Court did not disturb it. (App. 1:23 at ¶29 n. 20.)

In Wisconsin, governmental entities enjoy sovereign immunity from tort claims.[2] The Wisconsin Court's decision now also bars recovery for a governmental taking under the Wisconsin and U.S. Constitutions. The consequence is that private property owners have no redress when their property rights are taken; they are simply left to the capricious will of the government. This result violates the protections offered to private property owners under the United States Constitution.

The Wisconsin Court's decision directly conflicts with established Supreme Court takings' jurisprudence, the Sixth Circuit Court of Appeals, and also with several state supreme courts. This Court should have final resolution of the important issues in *E-L* due to similar takings that have occurred and will continue to occur in Wisconsin.[3]

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[2] *See, Wis. Stat.* § 893.80 (discussed in the *E-L* decision, App. 1 at ¶¶ 10, 33, 41, 47, 59).

[3] For example, the Wisconsin Court of Appeals stayed the proceedings in *Bostco, LLC v. MMSD*, Case No. 2007AP221, pending resolution of the *E-L* case. The *Bostco* case, in which a decision is pending at the Wisconsin appellate level, involves millions of dollars of costs to Bostco as a result of MMSD lowering the groundwater during construction of sewer pipes. In the *Michels Pipeline* case, the State of Wisconsin sued MMSD to prevent it from dewatering the soil with the result of drying up wells in the construction of a sewer. 63 Wis. 2d at 281, 217 N.W.2d at 340. The State argued MMSD's conduct created a nuisance. While E-L initially claimed MMSD's dewatering created a nuisance in this case, that cause of action was lost after the Wisconsin Court's ruling in *MMSD v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658, which was decided after E-L's case was filed. The 2005 decision of the Wisconsin Court held that sovereign immunity protected a governmental entity from nuisance claims. *Id.* 2005 WI 8 at

(Continued ...)

This Court should grant E-L's Petition for a Writ of Certiorari to restore private property owners' rights and correct Wisconsin's divergence from this Court's interpretation of the Fifth Amendment.

I. The Wisconsin Supreme Court's Decision Directly Conflicts With Case Law of The Supreme Court of the United States.

The Wisconsin Court incorrectly classifies E-L's damages as "mere consequential damages . . . which are not compensable under constitutional takings law." (App. 1:3 at ¶ 5.) This result directly conflicts with holdings of this Court.

Dugan v. Rank, 372 U.S. 609 (1963), dealt with an action by private property owners to enjoin the government from physically seizing upstream water in a way that lowered the water level on the plaintiffs' lands. The dispute arose from the government's efforts to redistribute waters within California to new areas for improved irrigation. *Id.* at 612. Project engineers recognized that the water flow within the areas owned by the plaintiffs would be severely diminished; yet the government moved forward without offering compensation to the landowners. *Id.* at 613.

This Court held that the plaintiffs' diminished water levels amounted to a partial taking. *Id.* at 623. A taking of one's water rights also "need not necessarily be a physical invasion of land." *Id.* at

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(... Continued)

¶¶ 50-62. As a consequence, E-L has no right to assert a nuisance claim against MMSD.

625. When the taking of water deprives an owner of its profitable use, there is "an appropriation of property for which compensation should be made." *Id.* (citing *Peabody v. U.S.*, 231 U.S. 530, 538 (1913)). Subjecting "land to the burden of governmental use in this manner might well be considered to be a 'taking' . . . and not merely a consequential damage incident to a public undertaking, which must be borne without any right to compensation." *Peabody*, 231 U.S. at 538 (internal citations omitted). This Court has recognized the "consequential damage" issue on which the Wisconsin Court hangs its hat, but *Dugan* explicitly states that property damages sustained by the taking of groundwater are compensable—not consequential.

In *Dugan*, this Court further determined that the "quantitative uncertainty" of the amount of actual water taken did not "preclude[] ascertainment of the value of the taking." *Dugan*, 372 U.S. at 623. Instead, damages "are to be measured by the difference in market value of the respondents' land before and after the interference or partial taking." *Id.* at 624-25.

A similar example can be found in *Int'l Paper Co. v. U.S.*, 282 U.S. 399 (1931), where the landowner used adjacent river water to produce electric power to run its paper mill. The government intervened and stopped the paper mill's use of the water for over nine months due to war-time necessity. *Id.* at 406. The inability to use the water to produce electric power cost the mill $304,685.36. *Id.* This Court determined that damages existed for the taking of the mill's use of the river water, stating:

> There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water, and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.

Id. at 407.

The *Int'l Paper* holding makes clear that *Dugan*'s "difference in market value" standard will depend on the landowner's "use" of the water. In *Int'l Paper*, the use of the water powered a paper mill. In E-L's case, the use of the water supported the structural integrity of a building. The end result is that the government permanently stopped E-L from using its groundwater, and now must compensate E-L for taking that reasonable use away.

Contrary to *Dugan* and *Int'l Paper*, the Wisconsin Court relied on two facts to deny E-L compensation for the permanent taking of its groundwater: first, MMSD never physically stepped foot on E-L's property and second, there was no evidence offered of the value of the buckets of groundwater permanently taken. (App. 1:3-1:4 at ¶ 5.) The Wisconsin Court also avoided the "taking" analysis by characterizing MMSD's actions as a tort to which it enjoys sovereign immunity.

The *Dugan* and *Int'l Paper* decisions not only show the Wisconsin Court's misapplication of law, they also reveal the Wisconsin Court's flawed reasoning. There is no dispute that MMSD pumped

groundwater away from E-L's property and the groundwater level was permanently reduced. Although MMSD did not physically step foot on the E-L's property, this does not bar the finding of a taking and affording reasonable compensation. *Dugan*, 372 U.S. at 625. Yet, the Wisconsin Court erroneously relies on the lack of physical presence to support its decision.[4]

Taken to its logical conclusion, the Wisconsin Court ruling holds that if a taking has in fact occurred, MMSD must only compensate E-L in buckets of water. (And before we even get to the value of a bucket of water, the Wisconsin Court ignores the impossibility of determining exactly how many buckets of water MMSD took.)

This conundrum within the Wisconsin Court's decision was logically avoided by this Court in *Dugan*. Namely, the value of a bucket of water or even the quantity of buckets taken is *not* the pertinent question. *See Dugan*, 372 U.S. at 623. Instead, this Court recognized that the only way to "measure the injury done by an invasion of this right is to ascertain the depreciation in market value of the physical property." *Id.* at 625 (citing *Collier v. Merced Irr. Dist.*, 2 P.2d 790, 797 (Cal. 1931)). Clearly groundwater was taken by MMSD that resulted in the depreciated market value of E-L's

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[4] *See also Eberle v. Dane County Bd. of Adj.*, 227 Wis. 2d 609, 621, 595 N.W.2d 730, 737 (1999) ("[a] 'taking' need not arise from an actual physical occupation of land by the government"). However, the Wisconsin Court seemingly confuses Wis. Stat. § 32.10 (which requires a physical occupation to occur before an inverse condemnation action is ripe) with property owners' Constitution protections (which do not require physical occupation).

property. This appropriation of groundwater deserves just compensation through *Dugan*'s market value analysis.

The Wisconsin Court's logic winds down to an absurd result. E-L proved its damages. Those damages were, of course, not in nominal dollars per bucket; instead, they were in the depreciated value of the building on the property, which was to restore the building to the condition that existed before MMSD took the groundwater from E-L's property. The Wisconsin Court ignores this Court's rationale in *Dugan* and incorrectly bars E-L from recovering its just compensation in direct conflict with the Fifth Amendment and established case law of this Court.

Finally, the Wisconsin Court seeks to brush aside the taking of E-L's property rights by characterizing the taking as a tort. "[A] property owner's remedy for unreasonable interference with its use of groundwater sounds in tort." (App. 1:36 at ¶ 43.) (citing *Michels Pipeline*, 63 Wis. 2d 278, 217 N.W.2d 339.) Indeed, the right claimed by E-L is "to the continued flow of water . . . and to its use as it flows. . . ." *Dugan*, 372 U.S. at 625. However, instead of analyzing E-L's "use of groundwater" under appropriate takings jurisprudence, the Wisconsin Court erroneously converts E-L's cause of action into a tort claim, which is conveniently barred from recovery in Wisconsin. (*See* App. 1:37 at ¶ 44.)

To the extent that Wisconsin law now bars property owners from recovering under the Fifth Amendment for a taking of groundwater—or the reasonable use of it—this Court must overturn the Wisconsin Court and correct its divergence from established Fifth Amendment takings jurisprudence.

II. The Wisconsin Supreme Court's Decision Directly Conflicts With Other State Supreme Courts and the Sixth Circuit Court of Appeals.

The reasoning of this Court in *Dugan* is followed by several state supreme courts and the Sixth Circuit Court of Appeals, which also conflict with the Wisconsin Court's decision in *E-L*. This Court should accordingly review the *E-L* decision to settle conflicting law across state jurisdictions.

A. Ohio and Sixth Circuit Court of Appeals.

In *McNamara v. Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433, 838 N.E.2d 640, a case cited by E-L in its state court proceedings, the United States Circuit Court of Appeals for the Sixth Circuit certified this question to the Supreme Court of Ohio:

> Does an Ohio homeowner have a property interest in so much of the groundwater located beneath the land owner's property as is necessary to the use and enjoyment of the owner's home?

Id. at 244 ¶ 10. The simple answer is that "a landowner's right to the water underlying his property is protected by law." *Id.* at 246 ¶ 20. The government argued that because the landowner is only entitled to use the water, but does not have title to the water itself, the government has not taken anything. *Id.* at ¶ 21. The Ohio Court rejected this argument, stating that title to the property "includes the right to use the groundwater beneath the

property." *Id.* at ¶ 22. Although a riparian owner may not have separate title to the water in an adjacent stream, the owner still "does own the right to the reasonable use of the stream as part of the title to his real estate." *Id.* at 247 ¶ 28. The "reasonable use" standard "recognizes the essential relationship between water and property and confirms that groundwater rights are a separate right in property." *Id.* at 246 ¶ 22 (citing *Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324 (Ohio 1984)). Although an action for "unreasonable use of water sounds in tort, it is based upon the property right" for which the landowner is entitled to recover under the Fifth Amendment. *Id.* at 247-48 ¶¶ 23-29. Based upon the Ohio Court's determination, the Sixth Circuit reversed the district court's decision based upon a lack of a property interest in groundwater for a determination of whether the government had taken the interest in violation of the U.S. Constitution. *Hensley v. City of Columbus,* 433 F.3d 494 (6th Cir. 2003), *cert. denied* 552 U.S. 813 (2007).[5]

Consistent with Ohio, Wisconsin also recognizes property rights of a landowner to reasonable use of groundwater and a riparian owner's reasonable use of water. *Compare Michels Pipeline*, 63 Wis. 2d 278, 217 N.W.2d 308 *with*

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[5] While the *Hensley* case would seem on point, the courts did not reach the merits because the plaintiffs' taking claim was eventually dismissed as both untimely under the applicable statute of limitations and premature for failing to exhaust state law procedure. *Hensley v. City of Columbus,* 557 F.3d 693 (6th Cir. 2009). Unlike the plaintiff in *Hensley,* E-L has exhausted Wisconsin's state law procedure and only has the U.S. Supreme Court available to it to protect its U.S. Constitutional rights.

McNamara v. Rittman, 107 Ohio St. 3d 243, 2005-Ohio-6433, 838 N.E.2d 640.

However, although recognizing these property rights, the Wisconsin Court found that the Fifth Amendment did not protect against their taking by MMSD. The Wisconsin Court reasons that because E-L did not prove the value of the water taken, the court is not obligated to determine if a taking actually occurred or if E-L actually owned the groundwater. This is backwards.

The Fifth Amendment requires that a court first ask whether a taking occurred, and second, how much just compensation is necessary. *See Eberle v. Dane County Bd. of Adj.*, 227 Wis. 2d 609, 595 N.W.2d 730, 737, ¶ 22 (Wis. 1999) ("the threshold inquiry is whether the property has been 'taken'"). If MMSD's pumping of E-L's groundwater is a taking, then E-L must receive just compensation under the Constitution.

The Wisconsin Court punts the taking question by resting its decision on an incorrect theory of damages. The jury determined that E-L incurred damages from MMSD's taking. Those damages equate to E-L's just compensation. The Wisconsin Court sweeps those damages under the rug by labeling them "consequential" to avoid the important "threshold inquiry" in E-L's case, thus denying E-L just compensation to which it is entitled under the Fifth Amendment. *See id.*

Additionally, in *dicta* as a "belt and suspenders" support for its holding, the Wisconsin Court stated that because E-L's tort claims were dismissed (due to a sovereign immunity statute), "the jury should not have been asked to evaluate the reasonableness of the groundwater removal." (App. 1:23 at ¶ 29, n. 20.) The court went on to say that the

circuit court instruction to the jury that "[g]roundwater is considered the property of the person who owns the land under which it flows" was also incorrect. (*Id.*)

Whether E-L's property rights are "use of the groundwater" or "title" to it, consistent with this Court's decision in *Dugan,* the Ohio Court found this distinction without a meaning. *See McNamara*, 107 Ohio St. 3d 243, 246-247, ¶22, 838 N.E.2d at 644-645, ¶ 22. Once the Ohio Court ruled there was a property interest, the Sixth Circuit remanded for a determination of whether the government had taken the property right. The Wisconsin Court suggests, contrary to *Dugan* as followed by Ohio and the Sixth Circuit, that a "use" property right is not entitled to protection by the Fifth Amendment.

B. California

This Court's decision in *Dugan* cited the California Supreme Court case *Collier v. Merced Irr. Dist.*, 2 P.2d 790 (Cal. 1931), stating:

> The riparian right is a part and parcel of the land in the legal sense, yet it is a usufructuary and intangible right inhering therein and neither a partial nor a complete taking produces a disfigurement of the physical property.

Collier, 213 Cal. at 571-572, 2 P.2d at 797. Thus, when the government takes groundwater, damages must be determined by the resulting diminution in property value. *Id.*

The E-L trial court gave jury instructions consistent with this rule from *Collier* that was

embraced by this Court in *Dugan*.[6] However, the Wisconsin Court ignores this established law. Instead of damages based upon the resulting diminution of value, the Wisconsin Court held that the value of each bucket of water must be determined.

Various state court cases and the Sixth Circuit are in conflict with the principles laid out in the Wisconsin Court's decision. The Wisconsin Court elected to avoid a simple rule: when the government interferes with a landowner's right to the reasonable use of water on the land, the landowner must be paid just compensation. Just how much just compensation MMSD should pay E-L was proven at trial. The trial court awarded E-L over $300,000 as just compensation because that is how much E-L's property had declined in value after MMSD took groundwater from E-L's property. This reasoning is supported by takings jurisprudence of this Court, the Sixth Circuit and other state supreme courts.

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[6] The jury was instructed: "If only part of an owner's property is taken, and if taking part of the property reduces the value of the property that remains, the government must pay the difference between the fair market value of the property before the taking and the fair market value of the property after the taking." (App. 2:14-2:15 at ¶ 17.) MMSD did not object to this instruction.

CONCLUSION

Because the Wisconsin Court's decision conflicts with established precedent of this Court, the Sixth Circuit and decisions of other state supreme courts, involves important groundwater rights, and E-L has no further recourse to protect its Fifth Amendment rights, E-L respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Dated: September 29, 2010.

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APPENDIX

785 N.W.2d 409
Supreme Court of Wisconsin

E-L Enterprises, Inc., Plaintiff-Respondent,
v.

Milwaukee Metropolitan Sewerage District,
Defendant-Appellant-Petitioner.

No. 2008AP921.
Argued Oct. 21, 2009. Decided July 2, 2010.

Opinion:

¶1 ANNETTE KINGSLAND ZIEGLER, J.

This is a review of a published decision of the court of appeals,[1] which affirmed the judgment entered on a jury verdict by Milwaukee County Circuit Court, Richard J. Sankovitz, Judge. The jury found that when constructing a sewer, the Milwaukee Metropolitan Sewerage District (the Sewerage District) unreasonably removed groundwater from the property of E-L Enterprises, Inc. (E-L), which caused E-L's building to settle and amounted to a taking of E-L's property without just compensation. The jury awarded E-L damages in the amount of $309,388.

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[1] *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2009 WI App 15, 316 Wis.2d 280, 763 N.W.2d 231.

¶2 The Sewerage District filed a motion for judgment notwithstanding the verdict on the grounds that the damages E-L suffered to its property were consequential damages resulting from governmental action and therefore were not compensable under the takings clause of the Wisconsin Constitution. Alternatively, the Sewerage District moved for a new trial based on insufficient evidence to support the verdict. The circuit court denied the Sewerage District's motions and awarded E-L its attorney fees and costs. The circuit court then entered judgment in the amount of $624,375.48 on behalf of E-L and against the Sewerage District.

¶3 The Sewerage District appealed, and the court of appeals affirmed. The Sewerage District petitioned this court for review, and we accepted. We now reverse the decision of the court of appeals.

¶4 This case presents the following issues: (1) whether the Sewerage District's conduct constituted a taking of E-L's property without just compensation in violation of Article I, Section 13 of the Wisconsin Constitution and the Fifth Amendment of the United States Constitution;[2] and (2) whether E-L has established an inverse condemnation claim under Wis. Stat. § 32.10 (2007-08),[3] entitling E-L to attorney fees and costs.[4]

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[2] The issue of whether the Sewerage District's conduct constituted a taking under the U.S. Constitution was not invoked, argued, or appealed below. However, pursuant to our order, the parties briefed the issue before this court.

[3] All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise indicated. Wisconsin Stat. §

(Continued ...)

¶5 As a preliminary matter, we need not decide today the panoply of issues that relate to an alleged taking of groundwater. In this case, E-L introduced no proof as to the value of the extracted groundwater.[5] Instead, E-L seeks damages for the

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(... Continued)

32.10, "Condemnation proceedings instituted by property owner," provides:

If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the occupying person as defendant. The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

[4] Pursuant to Wis. Stat. § 32.28(3), "litigation expenses shall be awarded to the condemnee if: ... (c) The judgment is for the plaintiff in an action under s. 32.10."

[5] E-L sought damages for the cost to repair its building and the attorney fees and costs E-L incurred litigating with the

(Continued ...)

cost to repair its building and for the loss of use of its wood piles. The Sewerage District did not physically occupy the property for which E-L seeks compensation, and no government-imposed restriction deprived E-L of all, or substantially all, of the beneficial use of its property. Accordingly, what remains are mere consequential damages to property resulting from governmental action, which are not compensable under constitutional takings law.[6] The damage to E-L's building was caused by the alleged negligent construction of the sewer; hence, E-L's claim sounds in tort and seeks damages for which the Sewerage District is not liable under the doctrine of governmental immunity. For the same reasons, we further conclude that E-L has failed to establish an inverse condemnation claim under Wis. Stat. § 32.10. E-L is therefore not entitled to attorney fees and costs under Wis. Stat. ch. 32. Accordingly, this court reverses the decision of the court of appeals.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

(... Continued)
neighbor who owned the adjacent alley and refused E-L access to make the repairs. At trial, E-L introduced proof of those damages. We are cognizant of the fact that the jury was asked to determine the sum of money that would "justly compensate E-L for the taking of the groundwater"; however, there was no proof introduced at trial as to the value of the extracted groundwater. *See infra* Part III.A.1.

[6] We have in this case "only damage, without appropriation to the public purpose," and therefore, E-L is unable to recover its damages on the theory of a constitutional taking for public use. *See Wis. Power & Light Co. v. Columbia Cnty.*, 3 Wis.2d 1, 6-7, 87 N.W.2d 279 (1958).

¶6 In the 1980s, the Sewerage District constructed the Deep Tunnel System, a 19 mile long system of sewers across Milwaukee County "that help[s] reduce water pollution by storing excess wastewater 140 to 330 feet underground" until the wastewater can be treated at reclamation facilities.[7] The Deep Tunnel included the 1987-88 construction of the Crosstown[7] sewer (the sewer), a "near-surface collector sewer" that collects sewage overflow and diverts it away from the Menominee River and into storage in the Deep Tunnel. The sewer was constructed for the Sewerage District by Bowles Contracting Inc./Tomasini Construction Inc. Joint Venture (BCI/TCI). Pursuant to the Sewerage District's contract with BCI/TCI, the means and methods of the construction were left to BCI/TCI's discretion. The contract required BCI/TCI to avoid damage to neighboring buildings and to repair any damage caused by the removal of water from the construction site. Under the contract, BCI/TCI was responsible for any resulting damage to surrounding properties.

¶7 To construct the sewer, BCI/TCI dug a trench, installed sewer pipes, and restored the surface. A portion of the sewer was constructed in the Sewerage District's easement under a private alley adjacent to the subject building owned by E-L on

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[7] *See* the Milwaukee Metropolitan Sewerage District website http://v2.mmsd.com/deeptunnelhistory.aspx (providing the history of the Deep Tunnel System); http://v2.mmsd.com/deeptunnelhowitworks.aspx (explaining how the Deep Tunnel works).

North 12th Street in Milwaukee.[8] E-L's building was built in 1928 on "wood piles," long wooden poles that are capped with concrete and driven into the ground to provide support for the building's foundation. To prevent the wood piles from rotting and weakening, they must be sufficiently saturated with water.

¶8 However, in order for BCI/TCI to properly lay the sewer pipe and pour concrete, the trench had to be dry. Accordingly, BCI/TCI pumped groundwater from the trench for 17 days. When the sewer was completed in 1988, groundwater measurements showed that the level of groundwater near E-L's building had been significantly reduced. It took two years for the groundwater level to recover.

¶9 In 1998, about ten years after the sewer project was completed, E-L's owner, Joseph Loftus, noticed that cracks in the foundation of his building appeared to be worsening, so he started to monitor the building's settlement rate. In 2001, an engineer examined the building's wood piles and determined that the caps of 14 wood piles had rotted and were no longer able to support the building. Those particular wood piles were under the south wall of E-L's building, nearest to the 1987-88 sewer construction site. In September 2003, E-L notified the Sewerage District of the building damage, and in October, E-L repaired the building. To repair the building, the damaged portions of the wood piles were sawed off and replaced with concrete. The

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[8] It is undisputed that neither BCI/TCI, the construction trench, nor the Sewerage District ever entered E-L's property.

repairs cost a total of $309,388, which includes E-L's attorney fees incurred in litigation with a neighbor who owned the adjacent alley and refused E-L access to make the building repairs. It is undisputed that E-L continued to lease the building throughout this entire period.

¶10 On June 23, 2004, E-L filed suit against the Sewerage District and CNA Insurance Companies (CNA), the insurer for the now defunct BCI/TCI. E-L alleged causes of action against the Sewerage District for negligence, continuing nuisance, and inverse condemnation and alleged causes of action against CNA for negligence and continuing nuisance.[9] The circuit court dismissed E-L's negligence and nuisance claims against the Sewerage District on the basis of governmental immunity under Wis. Stat. § 893.80(4).[10] Accordingly, only E-L's inverse condemnation claim remained.[11]

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[9] Before trial, CNA settled E-L's negligence and nuisance claims in a confidential agreement.

[10] Wisconsin Stat. § 893.80(4) provides:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. E-L did not appeal the circuit court's dismissal of its negligence and nuisance claims against the Sewerage District; accordingly, that issue is not before this court.

[11] Within its cause of action for "inverse condemnation," E-L alleged both a constitutional takings claim and an inverse

(Continued ...)

¶11 As to the inverse condemnation claim, E-L's complaint alleged that the Sewerage District's operation and maintenance of the Deep Tunnel System and the pipes constructed as a part of the sewer "physically took portions of the wood piles which rendered them unusable and damaged the E-L Building." E-L alleged that the Sewerage District's acts constituted a taking:

> [The Sewerage District's] conduct constitutes a taking of E-L Enterprises' property for public use. Specifically, [the Sewerage District's] conduct constitutes a physical invasion that deprived and continues to deprive E-L Enterprises of all beneficial use of the wood piles in violation [of] the Fifth Amendment of the United States Constitution and Article I, Section 13 of the Wisconsin Constitution.
>
> ....
>
> [The Sewerage District] took E-L Enterprises' property without paying E-L Enterprises its just compensation. In addition to damages, E-L's complaint demanded attorney fees and

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(... Continued)
condemnation claim under Wis. Stat. § 32.10, although § 32.10 was not expressly referenced.

costs relating to E-L's claim for inverse condemnation.[12]

¶12 E-L's takings claim under Article I, Section 13 of the Wisconsin Constitution proceeded to a jury trial. The special verdict form asked the jury whether the Sewerage District's removal of groundwater from E-L's property was a taking. To assist the jury in answering that question, the circuit court instructed the jury that the law bars the government from taking property for public use without compensating the owner and that "[g]roundwater is considered property of the person who owns the land under which it flows."[13] If the jury found that the Sewerage

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[12] In its order on July 19, 2007, before trial, the circuit court denied E-L's request for attorney fees and costs on the grounds that E-L did not have a claim for inverse condemnation under Wis. Stat. § 32.10. After the trial, the circuit court reconsidered its earlier order and decided that E-L was entitled to attorney fees and costs under ch. 32. Accordingly, E-L's entitlement to attorney fees and costs is an issue before this court on appeal.

[13] The Sewerage District objected to the circuit court's instruction that "[g]roundwater is considered property of the person who owns the land under which it flows":

[The Court]: ... [The Sewerage District] deleted the sentence or propose to delete the sentence, "Groundwater is considered property of the person who owns the land under which it flows." That statement is true. It's not their exclusive property. They don't have the right to exclude others from using it, but they do have the right to use it, and *Michels* [*State v. Michels Pipeline Constr., Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974)] recognizes that they have a property interest in it.

So as a matter of fact, it is E-L's property, not its property alone, but it is E-L's property. Otherwise if E-L doesn't have any property interest in here, game over. This case ends. If it has no property interest in it, they cannot make a claim for just compensation.

(Continued ...)

District's removal of groundwater from E-L's property was a taking, the jury was required to answer whether the removal of groundwater from E-L's property caused E-L's building to settle. If the jury answered that question in the affirmative, the jury had to determine the sum of money that would "justly compensate E-L for the taking of the groundwater beneath the south end of [E-L's] building."

¶13 The jury found that the Sewerage District's removal of groundwater from E-L's property was unreasonable, constituted a taking, and caused E-L's building to settle. The jury awarded E-L $309,388 "for the taking of groundwater" beneath its building-an amount equal to the cost to repair E-L's building

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(... Continued)
[Attorney James H. Petersen, counsel for the Sewerage District]: Your Honor, I guess that's precisely the point the District is getting at. Groundwater is a common good. If you have property, you have a right to use the groundwater that passes underneath your land, and even some of the groundwater that's under your neighbor's land, by virtue of your property ownership. But it doesn't mean that that groundwater is yours to the exclusion of others.
[The Court]: I'm not saying that either, and my instructions don't say that either.
[Atty. Petersen]: These instructions allow that. They allow that to be argued.
[The Court]: First of all, it doesn't matter whether they allow that or not. The jury is not being asked to find that this was E-L's property exclusively.
In fact, the jury is being instructed to the opposite, that both the District and E-L and anybody else in that neighborhood had the right to use that property as long as they used it reasonably.

and the attorney fees E-L incurred litigating with the neighbor who owned the adjacent alley and refused E-L access to make the repairs.

¶14 In its November 7, 2007 order, the circuit court denied the Sewerage District's motion for judgment notwithstanding the verdict or, in the alternative, a new trial and granted E-L's request for attorney fees and costs under Wis. Stat. ch. 32.[14]

¶15 The Sewerage District appealed, and the court of appeals affirmed, concluding that the jury verdict supported E-L's inverse condemnation claim under Article I, Section 13 of the Wisconsin Constitution and Wis. Stat. ch. 32. *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2009 WI App 15, ¶ 11, 316 Wis.2d 280, 763 N.W.2d 231. The court of appeals applied *Wisconsin Power & Light Co. v. Columbia Cnty.*, 3 Wis.2d 1, 87 N.W.2d 279 (1958), and reasoned that although mere consequential damage to property resulting from government action is not a taking, *E-L Enters.*, 316 Wis.2d 280, ¶ 9, 763 N.W.2d 231, "the Sewerage District had 'reason to anticipate that damage would result from its acts,' " *id.*, ¶ 10 (quoting *Wis. Power & Light*, 3 Wis.2d at 7, 87 N.W.2d 279). Accordingly, the court of appeals concluded that "this case is on the 'taking' side of the line recognized by *Wisconsin Power & Light*." *E-L Enters.*, 316 Wis.2d 280, ¶ 10, 763 N.W.2d 231.

¶16 According to the court of appeals, this case is "most analogous" to this court's decision in

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[14] *See supra* note 12.

Damkoehler v. City of Milwaukee, 124 Wis. 144, 101 N.W. 706 (1904), later clarified in *Dahlman v. City of Milwaukee*, 131 Wis. 427, 439-40, 111 N.W. 675 (1907), in which we held that the removal of a building's lateral support by street grading constituted a compensable taking as opposed to consequential damages for which there was no remedy. *E-L Enters.*, 316 Wis.2d 280, ¶ 9, 763 N.W.2d 231. The court of appeals "[saw] no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same function." *Id.*, ¶ 11. Because "Wisconsin law already recognizes that a property owner's interest in the integrity of water may give rise to a protectable right," *id.* (citing *State v. Michels Pipeline Constr., Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974); *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928)), the court of appeals concluded that the Sewerage District's diversion of groundwater from E-L's property constituted a taking. *E-L Enters.*, 316 Wis.2d 280, ¶ 11, 763 N.W.2d 231.

¶17 In concluding that the Sewerage District's conduct constituted an "occupation" under Wis. Stat. § 32.10, *id.*, ¶ 7, the court of appeals explained that "[t]he law in Wisconsin is settled that an entity with the power of condemnation may 'occupy' land without physical entrance onto that land," *id.*, ¶ 8. In particular, the court of appeals cited *Wikel v. Department of Transportation*, 2001 WI App 214, 247 Wis.2d 626, 635 N.W.2d 213, for the proposition that "there may be a taking when the entity with the power of condemnation does something outside of the affected property that adversely impacts the

owner's use of that property." *E-L Enters.*, 316 Wis.2d 280, ¶ 8, 763 N.W.2d 231.

¶18 Finally, the court of appeals concluded that the circuit court did not err in awarding attorney fees and costs to E-L because E-L prevailed on its inverse condemnation claim under Wis. Stat. § 32.10. *Id.*, ¶ 21.

¶19 We now reverse the decision of the court of appeals.

II. STANDARD OF REVIEW

¶20 Whether government conduct constitutes a taking of private property without just compensation is a question of law that this court reviews de novo. *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 13, 244 Wis.2d 497, 628 N.W.2d 781; *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis.2d 74, 80, 284 N.W.2d 887 (1979) (hereinafter *Howell Plaza II*). In addition, whether an inverse condemnation claim has been established under Wis. Stat. § 32.10 involves the interpretation and application of a statute, which presents a question of law that we review de novo while benefiting from the lower courts' analyses. *C. Coakley Relocation Sys. v. City of Milwaukee*, 2008 WI 68, ¶ 14, 310 Wis.2d 456, 750 N.W.2d 900; *see also Koskey v. Town of Bergen*, 2000 WI App 140, ¶ 4, 237 Wis.2d 284, 614 N.W.2d 845.

III. ANALYSIS

A. Takings Claim

¶21 Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." Likewise, the Takings Clause of the Fifth Amendment of the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (citing *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)). In order to trigger the "just compensation" clause under either the Wisconsin Constitution or the U.S. Constitution, there must be a "taking" of private property for public use. *Zinn v. State*, 112 Wis.2d 417, 424, 334 N.W.2d 67 (1983); *Howell Plaza II*, 92 Wis.2d at 80, 284 N.W.2d 887.

¶22 Under the Wisconsin Constitution, two types of governmental conduct can constitute a taking: (1) "an actual physical occupation" of private property or (2) a restriction that deprives an owner "of all, or substantially all, of the beneficial use of his property." *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis.2d 720, 726, 226 N.W.2d 185 (1975) (hereinafter *Howell Plaza I*). Similarly, under the U.S. Constitution, governmental conduct gives rise to a takings claim when there is either (1) "direct government appropriation or physical invasion of private property" or (2) government regulation of private property that is "so onerous that its effect is tantamount to a direct appropriation." *Lingle*, 544 U.S. at 537, 125 S.Ct. 2074. The latter category, deemed a "regulatory taking," is per se compensable

under the Fifth Amendment if the regulation "requires an owner to suffer a permanent physical invasion of her property" or "completely deprives an owner of 'all economically beneficial us[e]' of her property." *Id.* at 538, 125 S.Ct. 2074 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)).

¶23 In this case, E-L does not claim that the Sewerage District's conduct constituted a regulatory taking. Rather, E-L claims that the Sewerage District "physically took" E-L's property.[15] E-L's brief

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[15] In its brief, E-L "asserts that the [Sewerage] District's taking was a physical, not regulatory, taking." Although E-L asserts that it is not claiming a regulatory taking, E-L's brief contradicts that by likening the Sewerage District's conduct to government regulatory action analyzed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

Loretto is an example of one of two categories of regulatory action that is deemed a per se taking under the Fifth Amendment. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (citing *Loretto* as an example of a regulatory taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (same). In *Loretto*, the United States Supreme Court held that a New York law requiring landlords to permit cable companies to install cable facilities in apartment buildings amounted to a permanent physical invasion of private property and thus required compensation as a matter of law. 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868. A permanent physical invasion of private property, like the installation of cable facilities occupying portions of a property owner's roof, is different than the "classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539, 125 S.Ct. 2074. The former is a per se taking that requires just compensation, *id.* at 538, 125

(Continued ...)

asserts that the Sewerage District "physically took E-L's groundwater and deprived E-L of the use of that groundwater, resulting in the diminished value of E-L's property." E-L argues that by pumping groundwater from the trench, thereby extracting the groundwater from beneath E-L's adjacent building, the Sewerage District physically occupied or directly appropriated E-L's groundwater for the construction of the sewer. The removal of the groundwater damaged the building's wood piles, causing the building to settle and reducing the value of E-L's property. Because the groundwater was appropriated in connection with the installation of the sewer, which was created for the public's use and benefit, E-L claims that it is entitled to just compensation under both the Wisconsin Constitution and the U.S. Constitution.

¶24 E-L's takings claim must fail. E-L's claim morphed from a complaint that the Sewerage District "physically took portions of the wood piles which rendered them unusable and damaged the E-L Building" into a special verdict form that asked the jury to determine the sum of money that would "justly compensate E-L for the taking of [the]

(... Continued)

S.Ct. 2074, "without regard to the public interests that it may serve," *Loretto*, 458 U.S. at 426, 102 S.Ct. 3164; *see also Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886 (stating that permanent physical invasions require compensation "no matter how weighty the public purpose behind it").

At oral argument, E-L reiterated that its claim is based on the classic, not regulatory, category of taking: the Sewerage District's actual occupation or direct appropriation of E-L's property.

groundwater." The groundwater was indeed that which was extracted by the Sewerage District, but E-L introduced no proof as to the value of the extracted groundwater. Therefore, whether E-L owns the extracted groundwater is inapposite in this case.[16] E-L instead seeks damages for the cost to repair its building and for the loss of use of its wood piles. However, the Sewerage District did not physically occupy the property for which E-L seeks compensation, and no government-imposed restriction deprived E-L of all, or substantially all, of the beneficial use of its property. What remains are mere consequential damages to property resulting from governmental action, which are not compensable under Article I, Section 13 of the Wisconsin Constitution or the Takings Clause of the Fifth Amendment.

1. Whether E-L owns the extracted groundwater is inapposite in this case.

¶25 To determine whether a taking occurred, E-L argues that "the first question that must be addressed is whether property owners have a property right in groundwater." As E-L correctly points out, there can be no takings claim if that which the Sewerage District allegedly took is not E-L's property. However, E-L introduced no proof as to the value of the extracted groundwater. Instead, E-L seeks damages that flow from the allegation that when the Sewerage District pumped groundwater

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[16] While we recognize the significance of this issue, it is our position that its resolution is better reserved for a future case.

from the trench, the groundwater level beneath E-L's building was lowered, causing the wood piles to dry out and the building to settle. E-L's opening and closing arguments at trial make clear that instead of seeking damages for the value of the extracted groundwater, E-L seeks damages for the cost to repair the wood piles and E-L's building.

¶26 In its opening argument, E-L claimed that the Sewerage District took E-L's groundwater but consistently spoke of damage to E-L's wood piles and building:

> [The Sewerage District] knew that its partial taking of the property, taking of groundwater would result in a lower value of E-L's building. You take the groundwater, the piles rot, your building sinks, your building is not worth what it was.
>
> ....
>
> As a result of [the Sewerage District] taking groundwater, E-L's property lost value, the entire property. We believe the value of the building lost the value equal to the amount of the repairs that had to be done.
>
> If I'm going to sell a house and you think it's worth $400,000, and I know the roof needs to be repaired for $30,000, somebody buying that is going to say, no, it's not $400,000, it's worth 370.
>
> They're going to take out the value. And that's what E-L contends is the

> amount taken. The loss in the value of their property. And the amount that we're seeking on that is just the amount E-L paid out of pocket.
>
> ....
>
> Everything we show you at trial is for you to see why E-L should be compensated for the taking of the groundwater by [the Sewerage District]. And how much money will equal the value of the groundwater taken by [the Sewerage District] and the harm caused to E-L from the damage to its piles.

¶27 Similarly, in its closing argument, E-L reiterated to the jury that E-L was seeking damages for the cost to repair its building:

> The next question [on the special verdict form] asks what amount should E-L be paid for its just compensation. And here's where we're going on this.
>
> ....
>
> ... The reduction in the fair market value was what were the repairs that had to be done on this place.
>
> And the repairs that had to be done are summarized in Exhibit 51[17] for

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[17] E-L's repeated reference to Exhibit 51 as a summary of its damages makes it readily apparent that E-L seeks damages for the cost to repair its building, as opposed to the value of the extracted groundwater. Exhibit 51, a five-page document titled

(Continued ...)

you. There's multiple exhibits that have all the invoices, but if you look at Exhibit 51, you're going to find a summary.

....

... The number we're asking for when you add up all the number [sic] for the 2003 work, the 2004 work, and the attorney fees, we had to fight, you know, we had an easement that was a very standard easement.[18]

We had an [sic] to get permission to go underneath and dig under that building....

....

(... Continued)

"Costs to Repair the Valley Business Center [or E-L's building]," is a comprehensive list of the repairs made to E-L's building and the costs thereof. The document has a "Detail" list of the repairs made, which includes "Window work," "Foundation, Interior ...," "Installed baseboard, etc.," "Electrical work for wall," "Wall repairs," "Demo piping, etc.," and like repairs.

[18] The circuit court instructed the jury that it was permitted to award E-L, as part of its just compensation, the attorney fees that E-L incurred in litigation with the neighbor who owned the adjacent alley and refused E-L access to make the building repairs. We conclude that the circuit court's instruction was improper. As the circuit court and the court of appeals correctly noted, under negligence law, when the defendant's wrongful acts caused the plaintiff to expend legal fees with another party, the expenditure is recoverable against the defendant. *See Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002 (1922). However, in this case, the Sewerage District is not liable in negligence.

> So, ladies and gentlemen, when you add to the 2,300 from Dahlman, the 2003 expenses, the 2004, and legal fees, the number I come to is 309,388, and that's what I'm going to ask that you find as compensation for the amount of the taking.

¶28 It is clear from E-L's opening and closing arguments that instead of seeking damages for the value of the extracted groundwater, E-L seeks damages for the cost to repair the wood piles and E-L's building.

¶29 Because E-L introduced no proof as to the value of the extracted groundwater, the court of appeals' reliance on *Dahlman* is misplaced.[19] It is true, as

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[19] E-L also relies on *Dahlman v. City of Milwaukee*, 131 Wis. 427, 111 N.W. 675 (1907), but not for the same proposition as the court of appeals did. E-L relies on *Dahlman* as Wisconsin Supreme Court precedent that "allows the recovery of property losses accompanying a taking of private property where there are foreseeable but unintended consequences." To that end, E-L also relies on *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 221 N.W. 381 (1928). Similarly, in its order denying the Sewerage District's motion for judgment notwithstanding the verdict, the circuit court cited *Dahlman* and *Price*, stating that "at least twice the supreme court has found a taking in circumstances in which the plaintiff's property losses although foreseeable were nonetheless unintended."

We reject E-L's and the circuit court's characterization of *Dahlman* and *Price*. In *Dahlman*, this court concluded that because a property owner, as against the city, is entitled to the lateral support of the soil underlying the owner's property, there was a taking of the soil when the city removed the lateral support in the course of street grading. 131 Wis. at 439-40, 111

(Continued ...)

noted by the court of appeals, *E-L Enters.*, 316 Wis.2d 280, ¶ 9, 763 N.W.2d 231, that in *Dahlman*, this court held that the removal of a building's lateral support by street grading constituted a compensable taking. 131 Wis. at 436-40, 111 N.W. 675. There is a significant distinction, however, between *Dahlman* and this case. In *Dahlman*, we concluded that even though the subsidence of the soil caused no depreciation in the value of the property owners' premises, the property owners were still entitled to recover nominal damages for the value of the property taken for public use, which in that case, was soil. *Id.* In this case, E-L introduced no proof as to the value of the extracted groundwater. Instead, E-L seeks damages for the cost to repair its building and for the loss of use of the wood piles. Because E-L introduced no proof as to the value of the extracted groundwater, we need not decide today whether E-L owns the groundwater. Accordingly, the issue of whether a landowner owns

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(... Continued)

N.W. 675. Our conclusion that the city's actions constituted a taking hinged on the property owner's right to the lateral support of the soil, *id.*, not on the foreseeability of the property loss. Likewise, in *Price*, this court held that the plaintiff established a claim under the then-existing inverse condemnation statute when the construction and maintenance of dams across the Menominee River caused the river to overflow onto the plaintiff's land, moistening the soil to the point of destroying the land's agricultural value. 197 Wis. at 26, 28, 221 N.W. 381. In that case, our conclusion that the plaintiff stated a takings claim centered on the plaintiff's allegation that the flood waters physically invaded the plaintiff's property and entirely destroyed its value, *id.*; again, the foreseeability of the property loss played no part in the analysis.

the groundwater beneath his property is not before us today.[20]

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[20] While we take no position on the issue of whether a landowner owns the groundwater beneath his property, we nevertheless determine that the circuit court erred by instructing the jury that "[g]roundwater is considered property of the person who owns the land under which it flows." Contrary to the circuit court's contention, the jury instruction is not consistent with *Michels Pipeline*, 63 Wis.2d 278, 217 N.W.2d 339. In that case, the State claimed that the defendants (the Sewerage District, Michels Pipeline Construction, and Milwaukee County) created a public nuisance by pumping water from wells in order to sufficiently dewater the soil to permit tunneling for construction of a sewer. *Id.* at 281-82, 217 N.W.2d 339. According to the complaint, citizens "were caused great hardship by the drying up of wells, decreasing capacity and water quality in others, and by the cracking of foundations, basement walls and driveways, due to subsidence of the soil." *Id.* at 282, 217 N.W.2d 339. Concluding that the complaint stated facts sufficient to constitute a cause of action in tort, this court adopted section 858A of the Restatement (Second) of Torts, providing that a landowner may not withdraw groundwater in a manner that causes unreasonable harm to another's property. *Id.* at 302-03, 217 N.W.2d 339.

Our holding in *Michels Pipeline* recognized that while a landowner is permitted to withdraw groundwater for a beneficial purpose, he or she may be liable in tort for excessively withdrawing groundwater to the detriment of another's property. The circuit court dismissed E-L's negligence and nuisance claims against the Sewerage District on the basis of governmental immunity. As we previously noted, supra note 10, E-L did not appeal the dismissal of those tort claims.

Despite the dismissal of E-L's negligence and nuisance claims against the Sewerage District, the jury was nevertheless asked to determine if the Sewerage District's removal of groundwater from E-L's property was "unreasonable." As we have just explained, the withdrawal of groundwater in a manner that causes unreasonable harm to another's property may give rise

(Continued ...)

2. Mere consequential damage to property resulting from governmental action is not a taking thereof.

¶30 Both the United States Supreme Court and this court have consistently recognized that "government action outside the owner's property that causes consequential damages within" does not constitute a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *see also Howell Plaza II*, 92 Wis.2d at 80, 284 N.W.2d 887; *Howell Plaza I*, 66 Wis.2d at 725, 226 N.W.2d 185; *Wis. Power & Light*, 3 Wis.2d at 6, 87 N.W.2d 279. "Sec. 13, art. I, like its equivalent in the federal constitution, 'does not undertake, ... to

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to a tort claim. Because the circuit court dismissed the tort claims against the Sewerage District, the jury should not have been asked to evaluate the reasonableness of the groundwater removal.

Likewise, the jury was erroneously asked to determine whether the Sewerage District's removal of groundwater from E-L's property was a taking. Whether government conduct constitutes a taking of private property without just compensation is a question of law. *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 13, 244 Wis.2d 497, 628 N.W.2d 781. While a jury may properly be asked to determine questions of fact pertinent to a takings claim, e.g., the amount of damages that will justly compensate a property owner for a taking, *see Stelpflug v. Town Bd., Town of Waukesha, Cnty. of Waukesha*, 2000 WI 81, ¶ 26, 236 Wis.2d 275, 612 N.W.2d 700, the ultimate determination of whether government conduct constitutes a taking is a question of law that is not properly placed before a jury.

In this case, the special verdict form, which questioned the jury as to reasonableness and causation, was framed in terms of a negligence claim rather than a takings claim.

socialize all losses, but only those which result from a taking of property.' " *Id.* (quoting *United States v. Willow River Power Co.*, 324 U.S. 499, 502, 65 S.Ct. 761, 89 L.Ed. 1101 (1945)). As we pointed out previously, the U.S. Constitution and the Wisconsin Constitution, unlike the constitutions of other states,[21] provide only that the property of no person shall be "taken" for public use without just compensation; there is no mention of just compensation for property that is merely "damaged" for public use. *Howell Plaza II*, 92 Wis.2d at 81, 284 N.W.2d 887; *Howell Plaza I*, 66 Wis.2d at 726, 226 N.W.2d 185; *Wis. Power & Light*, 3 Wis.2d at 6, 87 N.W.2d 279. Therefore, "in the absence of a physical invasion which ousts the owner from full or partial possession or a total deprivation of beneficial use, mere damage to property (or property value) does not constitute a taking." 2A Julius L. Sackman, Nichols on Eminent Domain § 6.01[11], at 6-19 (3d ed. 2009).

¶31 In *Wisconsin Power & Light*, this court recognized that under the Wisconsin Constitution and the U.S. Constitution, "mere consequential damage to property resulting from government action is not a taking thereof." 3 Wis.2d at 6, 87 N.W.2d 279. In that case, a utility company alleged a takings claim against Columbia County. *Id.* at 4, 87

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[21] For example, Article I, Section 15 of the Illinois Constitution provides: "Private property shall not be taken *or damaged* for public use without just compensation as provided by law." (Emphasis added.) For a list of other states with similar constitutional provisions, *see* 2A Julius L. Sackman, Nichols on Eminent Domain § 6.01[11], at 6-22 n.52 (3d ed. 2009).

N.W.2d 279. In the process of building a road, the county deposited sand and gravel in a swamp adjacent to the utility company's electrical power line and close to one of its towers. *Id.* at 3, 87 N.W.2d 279. The sand and gravel extended under the surface of the swamp, "displacing the muck and peat so as to create mounds of earth eight to 10 feet high above the surface of the swamp under the power line and to move [the utility company's] tower horizontally and tilt it." *Id.* As a result, the tower was twisted and bent and had to be replaced. *Id.*

¶32 Like E-L's damaged building and wood piles in this case, the damaged tower "was not taken for public use in the usual sense of those words." *Id.* at 4, 87 N.W.2d 279. Just as E-L's building and wood piles were not used in connection with the sewer installation, the tower in *Wisconsin Power & Light* was not used in connection with the county's highway project. *Id.* Rather, the tower "was merely damaged by accident" as a result of the highway project. *Id.* Because the issue was one of "only damage, without appropriation to the public purpose," *id.* at 6, 87 N.W.2d 279, this court concluded that the utility company was unable to recover its damages on the theory of a constitutional taking for public use, *id.* at 7, 87 N.W.2d 279.[22]

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[22] To reach its conclusion that the county's conduct did not constitute a taking, this court gave weight to the following facts:

[T]he tower had no utility, direct or indirect, to the highway project, that the county did not need or desire the tower or the land on which it rested and did not intend to acquire or affect either the tower or the land, that the public obtained no benefit

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from injuring it, that the county had no reason to anticipate that damage would result from its acts, and that the injury to the tower was purely accidental. *Wis. Power & Light*, 3 Wis.2d at 7, 87 N.W.2d 279.

Here, the court of appeals erroneously distinguished those facts from the facts in this case to conclude that the Sewerage District's conduct "is on the 'taking' side of the line recognized by *Wisconsin Power & Light*." *E-L Enters.*, 316 Wis.2d 280, ¶ 10, 763 N.W.2d 231. The court of appeals first reasoned that "unlike the situation in *Wisconsin Power & Light*, the Sewerage District had 'reason to anticipate that damage would result from its acts.' " *Id.* Specifically, evidence "indicated that the Sewerage District was aware of a potential groundwater problem in connection with buildings near the project and, indeed, had directed its contractor to be careful to avoid damage to those buildings as the result of 'removal or disturbance of groundwater....' " *Id.* The court of appeals further reasoned that "unlike the situation in *Wisconsin Power & Light*, where 'the public obtained no benefit from injuring' the tower, ... draining the groundwater facilitated the Sewerage District's construction" and therefore had utility to the sewer project. *Id.*

The court of appeals' reasoning is flawed in two respects. First, the fact that this court recognized in *Wisconsin Power & Light* that "the county had no reason to anticipate that damage would result from its acts," 3 Wis.2d at 7, 87 N.W.2d 279, does not establish that foreseeability of damages supports a takings claim. To the contrary, we expressly declined to place significance on any of the *Wisconsin Power & Light* facts standing alone. *Id.* Rather, we concluded that the facts "collectively" negated a taking in the constitutional sense. Id. Second, the court of appeals' distinction between this case and *Wisconsin Power & Light* presupposes that E-L is seeking damages for the extracted groundwater. As we pointed out previously, E-L is seeking damages for the cost to repair its building and the loss of use of its wood piles. Accordingly, the issue here is not whether the public obtained a benefit from the draining of the groundwater but instead whether the public

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¶33 Similarly, in this case, we conclude that the damages E-L suffered are mere consequential damages to property resulting from governmental action, which are not compensable under Article I, Section 13 of the Wisconsin Constitution or the Takings Clause of the Fifth Amendment. E-L seeks damages for the cost to repair its building and the loss of use of the wood piles. However, the Sewerage District did not physically occupy E-L's building or wood piles. The Sewerage District did not use the building or wood piles in connection with the sewer installation, and the public obtained no benefit from the damaged building or wood piles. Rather, the wood piles were damaged as a result of the Sewerage District's alleged negligent construction of the sewer. Accordingly, we have in this case "only damage, without appropriation to the public purpose." *Id.* at 6, 87 N.W.2d 279. Such damage is not recoverable in a takings claim but instead sounds in tort. The circuit court already dismissed E-L's tort claims against the Sewerage District on the grounds of governmental immunity under Wis. Stat. § 893.80(4).[23]

(... Continued)
obtained a benefit from the damaged wood piles. The public did not.

[23] Still, E-L is not without a remedy for the damage to its building caused by the alleged negligent construction of the sewer. Subject to the parties' confidential agreement, E-L has already been compensated an undisclosed amount by CNA, the insurer for the now defunct contractor.

¶34 The court of appeals relied upon our decision in *Damkochler* for authority that the Sewerage District's diversion of groundwater that supported the structural integrity of E-L's building constituted a compensable taking, as opposed to mere consequential damage to property for which there is no remedy. *See E-L Enters.*, 316 Wis.2d 280, ¶¶ 9, 11, 763 N.W.2d 231. In *Damkochler*, this court recognized that a landowner has the right to have her property protected against an excavation that causes her property to subside. 124 Wis. at 151, 101 N.W. 706. In that case, for purposes of improving the highway, the city of Milwaukee excavated a street adjacent to the plaintiff's property and caused "a considerable part of her land to subside and fall into the street." *Id.* at 150, 101 N.W. 706. We held that the city's actions, in removing the lateral support of the soil of the plaintiff's property, amounted to a compensable taking. *Id.* at 150-51, 101 N.W. 706. In so holding, we distinguished the underlying case from our holding in *Alexander v. City of Milwaukee*, 16 Wis. 247 (1862), in which we concluded that the damages to the plaintiff's property caused by the city's harbor improvements were consequential to the public improvement and were not recoverable from the city. *Damkoehler*, 124 Wis. at 150, 101 N.W. 706. We concluded that the *Damkoehler* facts fell within an exception to the general rule that consequential damage to property resulting from governmental action is not a taking thereof:

> [T]he court [in Alexander] expressly declare[d] that it [did] not wish 'to be understood as asserting the doctrine that there must be an actual taking or

> appropriation of the property itself in order to entitle the owner to compensation for damages done him. The city might so build a bridge, or open a street, or excavate a canal along or upon a lot, only appropriating a small amount of it, or perhaps none of the land itself, and yet entirely destroy the value of the property for all purposes.' The instant case, in its facts, comes within the exception so distinguished by the court, and cannot be held to be ruled by the decision of that case.

Id. (quoting *Alexander*, 16 Wis. at 253) (emphasis added). Accordingly, in *Damkoehler*, the city's actions amounted to a compensable taking because the city, by removing the lateral support of the soil of the plaintiff's property, caused a substantial part of the plaintiff's land to subside and fall and "'entirely destroy[ed] the value of the property for all purposes.'" *Id.* at 150, 101 N.W. 706 (quoting *Alexander*, 16 Wis. at 253).

¶35 The distinction between *Damkoehler* and this case is significant. In this case, E-L does not claim that by diverting the groundwater beneath E-L's building and thereby reducing the building's structural integrity, the Sewerage District deprived E-L of all, or substantially all, of the beneficial use of its building. Nor can E-L so claim. The fact that E-L continued to lease the building throughout this entire period is alone sufficient to show that the value of E-L's building was not destroyed for all

purposes. Therefore, this case does not fall under the *Damkochler* exception to the well-recognized rule that mere consequential damage to property resulting from governmental action is not a taking thereof.

B. Inverse Condemnation Claim

¶36 Wisconsin Stat. § 32.10 is based on Article I, Section 13 of the Wisconsin Constitution and "is the legislative direction as to how the mandate of the just compensation clause is to be fulfilled." *Zinn*, 112 Wis.2d at 433, 334 N.W.2d 67. "[A] landowner, who believes that his or her property has been taken by the government without instituting formal condemnation proceedings," may bring an inverse condemnation claim under § 32.10 to recover just compensation for the taking. *Id.* at 432-33, 334 N.W.2d 67 (recognizing that Wis. Stat. ch. 32 sets out the procedure the government must follow in acquiring private property for public use, and § 32.10 provides a remedy for when the government takes property without first condemning it and paying just compensation under ch. 32). Wisconsin Stat. § 32.10 provides in relevant part:

> *If any property has been occupied* by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced.... The

> court shall *make a finding of whether the defendant is occupying property of the plaintiff* without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter ... assuming the plaintiff is not questioning *the right of the defendant to condemn the property so occupied.*

(Emphasis added.) By its terms, § 32.10 "is designed solely to deal with the traditional exercise of eminent domain by the government: the government has occupied private property, plans to continue such occupation and the landowner is merely requesting just payment for this land." *Zinn*, 112 Wis.2d at 433, 334 N.W.2d 67.

¶37 To state a cause of action under Wis. Stat. § 32.10 in the absence of actual possession or occupation, this court concluded in *Howell Plaza I* that the facts alleged must "show that the property owner has been deprived of all, or practically all, of the beneficial use of his property or of any part thereof." 66 Wis.2d at 730, 226 N.W.2d 185. We later clarified that holding in *Howell Plaza II*, concluding that short of actual occupation, there must be a legal restraint by the condemning authority that deprives the owner of all, or substantially all, of the beneficial use of his property. 92 Wis.2d at 81-82, 87-89, 284 N.W.2d 887 (affirming circuit court's judgment in favor of the State Highway Commission in the

property owner's inverse condemnation action under Wis. Stat. § 32.10 because if the property owner "was in fact unable to develop its property, it was not due to any restriction imposed upon it by the commission"). Therefore, under this court's jurisprudence, in order to state a claim of inverse condemnation under § 32.10, the facts alleged must show either that there was an actual physical occupation by the condemning authority or that a government-imposed restriction deprived the owner of all, or substantially all, of the beneficial use of his property.

¶38 Still, when a property owner alleges a constitutional taking, the remedy provided by Wis. Stat. § 32.10 is not necessary to enforce the right to just compensation. *Zinn*, 112 Wis.2d at 438, 334 N.W.2d 67. The property owner has stated a claim based directly on Article I, Section 13 of the Wisconsin Constitution. *Id.*

¶39 In this case, E-L has failed to establish an inverse condemnation claim under Wis. Stat. § 32.10. It is undisputed that the Sewerage District did not physically occupy the property for which E-L seeks compensation, its building or the wood piles, and no government-imposed restriction deprived E-L of all, or substantially all, of the beneficial use of its property.[24] Therefore, the remedy provided in § 32.10 is simply inapplicable.

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[24] In concluding that the Sewerage District's conduct constituted an "occupation" under Wis. Stat. § 32.10, the court of appeals explained that "[t]he law in Wisconsin is settled that an entity with the power of condemnation may 'occupy' land

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without physical entrance onto that land." *E-L Enters.*, 316 Wis.2d 280, ¶ 8, 763 N.W.2d 231. In particular, the court of appeals cited *Wikel v. Department of Transportation*, 2001 WI App 214, 247 Wis.2d 626, 635 N.W.2d 213, for the proposition that "there may be a taking when the entity with the power of condemnation does something outside of the affected property that adversely impacts the owner's use of that property." *E-L Enters.*, 316 Wis.2d 280, ¶ 8, 763 N.W.2d 231.

In *Wikel*, the court of appeals reversed the circuit court's order dismissing the plaintiff's petition for inverse condemnation under Wis. Stat. § 32.10. 247 Wis.2d 626, ¶ 1, 635 N.W.2d 213. The Wisconsin Department of Transportation (DOT) condemned a five-foot strip of plaintiff's land for the purpose of constructing a retaining wall to prevent groundwater from entering a new highway. *Id.*, ¶ 3. The plaintiff accepted $4,000 from the DOT as just compensation for the acquisition of that strip of her property. *Id.* However, according to the plaintiff's petition, in connection with the construction of the retaining wall, the DOT caused structural damage to her residence, rendering her property valueless. *Id.*, ¶ 4.

As the court of appeals recognized, "'Land may be taken for public purposes, within the meaning of the constitutional provision, without actual occupancy or seizure by the taker.'" *Id.*, ¶ 12 (citing *Wis. Power & Light*, 3 Wis.2d at 4, 87 N.W.2d 279; *Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609, 621, 595 N.W.2d 730 (1999)). The court of appeals rejected the DOT's argument that the plaintiff's petition was insufficient because it failed to establish either that the government occupied the alleged damaged property or that the property was valueless. *Wikel*, 247 Wis.2d 626, ¶ 11, 635 N.W.2d 213. The plaintiff was "entitled to the opportunity to prove her allegation that the [DOT's] actions rendered her property 'uninhabitable and unsaleable' and therefore, constituted a 'total, permanent taking.'" *Id.*, ¶ 17.

Wikel is readily distinguishable from this case. In *Wikel*, the plaintiff claimed that the DOT's construction of the retaining wall rendered her property "uninhabitable and unsaleable" and therefore constituted a "total, permanent taking." *Id.*, ¶ 4. As discussed supra Part III.A.2, in this case, E-L does not claim

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¶40 Because E-L has failed to establish an inverse condemnation claim under Wis. Stat. § 32.10, E-L is not entitled to its attorney fees and costs under Wis. Stat. § 32.28(3).

IV. CONCLUSION

¶41 In summary, we need not decide today the panoply of issues that relate to an alleged taking of groundwater. In this case, E-L introduced no proof as to the value of the extracted groundwater. Instead, E-L seeks damages for the cost to repair its building and for the loss of use of its wood piles. The Sewerage District did not physically occupy the property for which E-L seeks compensation, and no government-imposed restriction deprived E-L of all, or substantially all, of the beneficial use of its property. Accordingly, what remains are mere consequential damages to property resulting from governmental action, which are not compensable under constitutional takings law. The damage to E-L's building was caused by the alleged negligent construction of the sewer; hence, E-L's claim sounds in tort and seeks damages for which the Sewerage District is not liable under the doctrine of governmental immunity. For the same reasons, we further conclude that E-L has failed to establish an

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that the Sewerage District's diversion of groundwater beneath E-L's building, which reduced the building's structural integrity, rendered E-L's building valueless. E-L cannot so claim because it is undisputed that E-L continued to lease the building throughout this entire period.

inverse condemnation claim under Wis. Stat. § 32.10. E-L is therefore not entitled to attorney fees and costs under Wis. Stat. ch. 32. Accordingly, this court reverses the decision of the court of appeals. The decision of the court of appeals is reversed.

¶42 ANN WALSH BRADLEY, J. (concurring).

I agree with the majority that mere consequential damage to property resulting from government action is not a taking. Majority op., ¶ 24. I also agree with the majority that the essence of this case sounds in tort. *Id.*, ¶ 5. Given the circuit court's conclusion that the District is immune from tort liability, I conclude that the District is not liable for these damages to E-L's property.

¶43 Over three decades ago, this court established that a property owner's remedy for unreasonable interference with its use of groundwater sounds in tort. *State v. Michels Pipeline Constr., Inc.*, 63 Wis.2d 278, 217 N.W.2d 339 (1974). The *Michels Pipeline* court adopted the portion of the then-existing draft of the Restatement (Second) Torts which addressed liability for use of groundwater. In relevant part, that section provided:

> A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless
> (a) The withdrawal of water causes unreasonable harm through lowering

> the water table or reducing artesian pressure....

Restatement (Second) Torts, Tentative Draft No. 17, April 26, 1971, § 858A.[25]

¶44 Under the circumstances presented here, the withdrawal of groundwater may have caused unreasonable harm to E-L. But the remedy for this wrong sounds not in takings, but in tort.[26]

¶45 Indeed, as this case was presented to the jury, E-L's "takings" claim strongly resembled a tort claim. E-L argued that the District should have foreseen the harm and could have taken measures to avoid it. Additionally, E-L sought as damages the amount of money that it lost in rent and the amount of money that it paid out of pocket to repair the building.[27]

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[25] This section was modified slightly before it was approved by the American Law Institute in 1979 as Restatement (Second) Torts § 858.

[26] In addition to filing tort and takings claims against the District, E-L also filed tort claims against the insurance company that insured BCI/TCI, the now-defunct subcontractor that constructed the tunnel. E-L and BCI/TCI settled the dispute for an undisclosed sum of money. Based on this record, it is unclear whether E-L has already been compensated in whole, or in part, for the cost of repairing its building.

[27] At closing arguments, E-L's attorney explained: "And the cost to E-L in the District's use of that groundwater ... it's roughly $309,000 is what it's cost E-L, plus loss of rent, what it's cost E-L because of the removal of the groundwater outside the trench by the District."

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¶46 Further, portions of the jury instructions and special verdict also resembled a tort inquiry. For instance, the jury was instructed to determine whether the District's use of groundwater was unreasonable:

> The burden is on E-L to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that the District's use of E-L's groundwater was unreasonable. In determining whether the District's use of E-L's groundwater was unreasonable, you should consider the District's need for the groundwater, E-L's need for the groundwater, the cost to E-L, if any, of the District's use of the groundwater, the cost to the District, if any, of not using the groundwater or of replacing the groundwater and whether the District's purposes for using E-L's

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When there has been a partial taking, compensation is typically measured as either (1) the fair market value of the portion of the property that was taken; or (2) "severance damages," measured as the difference between the fair market value of the property before the taking and the fair market value of the remaining parcel after the taking. Russell M. Ware, The Law of Damages in Wisconsin § 19.12 (5th ed. 2010); *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 14, 281 Wis.2d 173, 696 N.W.2d 194.

groundwater could have been achieved through other means.

The reasonableness or unreasonableness of the District's actions is not a takings question-it is a tort question.

¶47 The circuit court determined that the District is immune from tort liability. E-L's attempt to dress up its tort claim in takings clothes to circumvent the District's immunity is unavailing. Accordingly, I respectfully concur.

¶48 DAVID T. PROSSER, J. (dissenting).

At trial, a jury found that E-L Enterprises, Inc. (E-L) suffered $309,388 in damages caused by the Metropolitan Milwaukee Sewerage District (MMSD). The majority does not dispute the accuracy of these findings. Rather, it concludes that E-L may not collect the damages awarded because they are "consequential damages" that are not available to an injured party under Wisconsin takings law.

¶49 Put in context, this ruling not only overturns a reasonable jury verdict but also deprives E-L of any meaningful remedy for its injury. This case, then, is important beyond the specific issues decided. It exposes the chasm between government wrongdoing and citizen redress. For the reasons stated below, I respectfully dissent.

I

¶50 In the 1980s, MMSD undertook construction of deep tunnels to hold sewage until it can be treated, thereby reducing water pollution. As part of this project, MMSD constructed the Cross Town 7 Collector System (CT-7) tunnel, which was located next to E-L's property. Before construction, MMSD detected the presence of groundwater in the vicinity. To construct the tunnel, project managers deemed it necessary to remove groundwater from the trench that would house the tunnel.

¶51 In the process of removing groundwater from the soil around the tunnel, MMSD also removed groundwater from E-L's property. The loss of groundwater caused 14 wood piles that were supporting E-L's building to rot. The jury determined that $309,388 was just compensation for E-L's costs to repair the piles.

¶52 On June 23, 2004, after repairing the piles, E-L filed suit against MMSD and CNA Insurance Companies, the insurers for the private contractors that participated in the construction of the deep tunnel project. E-L's complaint alleged five causes of action: (1) negligence against MMSD; (2) continuing nuisance against MMSD; (3) inverse condemnation;[28] (4) negligence against CNA; and (5)

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[28] "Inverse condemnation" describes "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *U.S. v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (quoting D.

(Continued ...)

continuing nuisance against CNA. E-L settled with CNA prior to the trial of the case.

¶53 E-L did not enumerate five causes of action to increase its damages. E-L pled five causes of action because it was confronted with the challenge of grounding its claim for recovery in traditional legal theory. Because the facts of the case were unusual, the appropriate theory for the case was uncertain.

¶54 In its complaint, E-L presented its inverse condemnation claim as follows:

> 51. MMSD's operation and maintenance of the Deep Tunnel and the 48 inch sewer pipes which were constructed as a part of the Cross Town 7 Collector System *physically took portions of the wood piles* which rendered them unusable and damaged the E-L Building.
>
> 52. MMSD's conduct constitutes a taking of E-L Enterprises' property for public use. Specifically, MMSD's conduct constitutes a *physical invasion* that deprived and continues to deprive E-L Enterprises of all beneficial use of the wood piles in violation of the Fifth Amendment of

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(... Continued)
Hagman, Urban Planning & Land Development Control Law 328 (1971)).

> the United States Constitution and Article I, Section 13 of the Wisconsin Constitution.

(Emphasis added.)

¶55 By the time the case went to the jury, E-L had shifted the theory of its takings claim: MMSD did not "take" E-L's wood piles; MMSD "took" E-L's groundwater, thereby causing damage. The jury ultimately answered "yes" to the verdict question: "Was the District's removal of groundwater from E-L's property a taking?"

II

¶56 E-L also claimed negligence and nuisance. Both of these claims were dismissed by the circuit court. Initially, in March of 2006, the circuit court refused to dismiss these claims on grounds of governmental immunity. At the summary judgment stage, MMSD argued that its acts were "discretionary," not "ministerial," and therefore it was immune from liability. E-L, on the other hand, pointed to DNR-approved and -mandated groundwater depletion specifications, which prohibited MMSD and its contractors from lowering groundwater below existing levels.

¶57 Based on E-L's argument, the circuit court initially concluded that "the act for which E-L seeks to hold MMSD liable-exceeding the groundwater depletion limitation-constitutes a transgression in which MMSD had no discretion to engage." Relying on *Lister v. Board of Regents of the University of*

Wisconsin System, 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976), the court concluded that "nothing remain[ed] for judgment or discretion." The court, therefore, denied MMSD's summary judgment motion.

¶58 In February of 2007, nearly one year after denying MMSD's motion for summary judgment and six months before the case proceeded to trial, the court revisited its earlier decision. In the course of deciding other motions, the court acknowledged a different provision in the same DNR-approved and mandated specification. This provision required the contractor to control groundwater to perform work in the trenches in the dry, and to remove water when concrete is being placed and pipe is being laid. The circuit court concluded that "[d]iscretion is conferred [by the specification] because MMSD must exercise some judgment on how to obey both the duty to keep the excavation dry and safe as well as its duty not to draw the water down too low." Acknowledging that it made this ruling "relatively late in the game," the court dismissed both the negligence and nuisance claims. As a result, the parties proceeded to trial on the inverse condemnation claim alone.

¶59 Query: Isn't the natural remedy for the wrong in this case to be found in the law of negligence? Not if the court persists in unreasonably broad notions of governmental immunity and unreasonably narrow exceptions for tort recovery.[29] In any event, because

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[29] *See Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶¶ 37-81, 319 Wis.2d 622, 769 N.W.2d 1 (Prosser, J., concurring).

the jury awarded E-L damages under a different legal theory from negligence, questions about governmental immunity were not raised in the petition for review, and the case before us involves only questions pertaining to the inverse condemnation claim.

III

¶60 In the absence of an adequate remedy in tort law, the only remedy available to E-L comes from the Takings Clauses of the United States and Wisconsin Constitutions.[30] Yet the majority rejects E-L's takings claim, reasoning that, even if the removal of E-L's groundwater was a taking, the damages E-L seeks are consequential damages, which are unavailable under takings law. In my view, this analysis interprets the scope of damages under takings law too narrowly.

¶61 In *Luber v. Milwaukee County*, 47 Wis.2d 271, 276, 177 N.W.2d 380 (1970), this court rejected the argument that consequential damages arising from a taking were "to be suffered in legal silence." The court noted that the rule against consequential damages in eminent-domain cases had been attacked on the grounds that the rule ignores the "economic implications of the situation." *Id.* at 279, 177 N.W.2d

[30] *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use without just compensation"); Wis. Const. art. 1, § 13 ("The property of no person shall be taken for public use without just compensation therefor."). The majority decides that E-L's damages are not compensable under both the United States and Wisconsin Constitutions. Majority op., ¶ 24.

380 (quoting Frank A. Aloi & Arthur Abba Goldberg, A Reexamination of Value, Good Will, and Business Losses in Eminent Domain, 53 Cornell L. Rev. 604, 631 (1968)). The court held:

> The importance of allowing recovery for incidental losses has increased significantly since condemnation powers were initially exercised in this country. During the early use of such power, land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the 'just compensation' provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship. In modern society, however, condemnation proceedings are necessitated by numerous needs of society and are initiated by numerous authorized bodies. Due to the fact people are often congregated in given areas and that we have reached a state wherein re-development is necessary, commercial and industrial property is often taken in condemnation proceedings. When such property is taken, incidental damages are very apt to occur and in some cases exceed the fair market value of the actual physical property taken.

Id. at 279-80, 177 N.W.2d 380.

¶62 In this case, although E-L seeks recovery for damages beyond the value of the groundwater, it does not go so far as to seek the kinds of consequential damages sought in *Luber*. *Luber* dealt with consequential damages beyond the reduction in "fair market value" of the property-the landowner sought lost rent. In this case, however, the jury awarded E-L the reduction in fair market value of its property. The circuit court instructed the jury:

> If the government takes private property for a public use, the government must pay the owner the fair market value of the property that is taken. If only part of an owner's property is taken, and if taking part of the property reduces the value of the property that remains, the government must pay the difference between the fair market value of the property before the taking and the fair market value of the property after the taking.

¶63 Based on this instruction, the jury determined that E-L should be compensated in the amount of $309,388. Even though E-L presented this evidence in terms of the cost of repairing the piles, the cost of these repairs amounted to the reduction in value to E-L's property that resulted from MMSD's taking. The majority now reverses the decision of a properly instructed jury that determined the amount of compensation based on the evidence before it.

¶64 This point is further emphasized by E-L's initial claim that the "taking" was the taking of "portions of the wood piles" supporting the building. Whether MMSD "took" the wood piles or "took" the groundwater, the result was the same: MMSD took a portion of E-L's property, causing a reduction in fair market value to the remainder of that property.

¶65 Two early Wisconsin cases support the conclusion that damages are available in the circumstances here. In *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 145, 151, 101 N.W. 706 (1904), the city removed the lateral support for a building when grading an adjacent street, causing portions of the lot "to subside and slide into the excavated street." The court rejected the argument that the damages caused by the excavation of highways were "purely consequential," and permitted recovery under the Takings Clause. *Id.* at 152, 101 N.W. 706. The same situation arose in *Dahlman v. City of Milwaukee*, 131 Wis. 427, 439-440, 111 N.W. 675 (1907), and the court adopted the holding in *Damkoehler* for the proposition that "where a substantial part of the adjoining owner's land falls into the street by reason of the removal of its lateral support in the course of grading, there was a taking of the soil for public purposes and not a mere consequential damage." *Id.*

¶66 In upholding the jury verdict in the present case, the court of appeals correctly saw "no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same

function—that is, supporting the structural integrity of a building like that owned by E-L Enterprises." *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2009 WI App 15, ¶ 11, 316 Wis.2d 280, 763 N.W.2d 231. In neither *Damkoehler* nor *Dahlman* were the landowners seeking compensation for the specific physical property "taken" by the city: in both cases, the damage was caused by the city's act of grading a street. In both cases, like this case, a pattern of events took place: (1) the government performed an action that "took" part of the landowner's property; and (2) the direct consequence of that taking was a reduction in the value of the landowner's property.

¶67 The majority distinguishes *Damkoehler* on grounds that the landowner lost the entire value of the property. The court in *Damkoehler*, however, did not limit its holding in that way. It required that the city, in grading a street, "cause no *unnecessary* damage to an adjoining landowner," and asserted that the city's actions resulted in a taking "*to the extent* of such injury." *Damkoehler*, 124 Wis. at 150-51, 101 N.W. 706 (emphasis added).

¶68 Furthermore, the court in *Dahlman* held that a takings claim could be maintained "where a substantial part" of the property fell into the street. *Dahlman*, 131 Wis. at 440-41, 111 N.W. 675. In *Dahlman*, the jury found that the loss of soil "caused no depreciation in the value of the premises." *Id.* at 439, 111 N.W. 675. Yet the court permitted the landowner to recover nominal damages against the city. *Id.* at 440, 111 N.W. 675. This case is legally indistinguishable from *Dahlman*, save that the jury

here determined that the fair market value of E-L's property was reduced by $309,388.

¶69 The *Damkoehler* case has been cited in other jurisdictions, including South Carolina. In *White v. Southern Railway Co.*, 142 S.C. 284, 140 S.E. 560, 564 (1927), the South Carolina court wrote:

> The word "taken" in the constitutional provision cited is not limited in its meaning and application to cases in which there is an actual physical seizure and holding of property, but is broad enough to include cases in which the access to abutting premises is obstructed by the change of grade of a highway or there is such physical injury to property as results in destruction or substantial impairment of its usefulness.

See 20 C.J. 697, and the following cases therein cited: *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392 [(1866)]; *Tinker v. Rockford*, 36 Ill.App. 460 [(1890)]; *Hendershott v. Ottumwa*, 46 Iowa 658, 26 Am. Rep. 182 [(1877)]; *Offutt v.* [*Commissioners of*] *Montgomery County*, 94 Md. 115, 50 A. 419 [(1901)]; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 41 N.W. 677, 3 L.R.A. 247, 16 Am. St. Rep. 597 [(1889)]; *Broadwell v. Kansas*, 75 Mo. 213, 42 Am. Rep. 406 [(1881)]; *Mosier v. Oregon* [*R. &*] *Nav. Co.*, 39 Or. 256, 64 P. 453, 87 Am. St. Rep. 652 [(1901)]; *Stearns v. Richmond*, 88 Va. 992, 14 S.E. 847, 29 Am. St. Rep. 758 [(1982)]; *Kincaid v. Seattle*, 74 Wash. 617, 134 P. 504, 135 P. 820 [(1913)];

Damkoehler v. Milwaukee, 124 Wis. 144, 101 N.W. 706; *Forbes v. Orange*, 85 Conn. 255, 82 A. 559 [(1912)]; *Walters v. Baltimore* [& Ohio R.]R. Co., 120 Md. 644, 88 A. 47, 46 L.R.A. (N.S.) 1128 [(1913)]; *Coyne v. Memphis*, 118 Tenn. 651, 102 S.W. 355 [(1907)]; *Hamilton County v. Rape*, 101 Tenn. 222, 47 S.W. 416 [(1898)].

IV

¶70 At the end of the twentieth century, the United States Supreme Court observed that the Takings Clause of the United States Constitution prohibits government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). The *Damkoehler* court said much the same thing 90 years earlier:

> We are not unmindful that other jurisdictions hold that damages resulting from landslides caused by excavations on highways in the course of improving them for public use are purely consequential, and not recoverable by the owner. *We find the doctrine of liability under such circumstances more consonant with reason and justice....*

Damkoehler, 124 Wis. at 152, 101 N.W. 706 (emphasis added).

¶71 Because the majority expects E-L to suffer in legal silence, I respectfully dissent.

Parallel Citations
2010 WI 58

2009 WI App 15
316 Wis.2d 280, 763 N.W.2d 231

E-L ENTERPRISES, INC., Plaintiff-Respondent,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, Defendant-Appellant,[fn†]

Court of Appeals of Wisconsin.
No. 2008AP921.
Submitted on briefs December 2, 2008.
Decided December 23, 2008.

[fn†] Petition to review granted 5/12/09.

APPEAL from a judgment of the circuit court for Milwaukee County:

On behalf of the defendant-appellant, the cause was submitted on the briefs of Michael J. McCabe, James H. Petersen and Lauri A. Rollings.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of Jerome R. Kerkman and Joseph R. Cincotta of Kerkman & Dunn, Milwaukee.

Before Fine, Kessler and Brennan, JJ.

¶1. FINE, J.

The Milwaukee Metropolitan Sewerage District appeals a judgment entered on a jury verdict in favor of E-L Enterprises, Inc., that found the Sewerage

District liable to E-L Enterprises under an inverse-condemnation theory for damage to E-L Enterprises's property as the result of the Sewerage District having drained groundwater from around the pilings supporting the building.[1] The Sewerage District contends that the requisites to inverse condemnation under both article I, section 13 of the Wisconsin Constitution and WIS. STAT. § 32.10 were not met. The Sewerage District also argues that the calculation of damages was erroneous and that the statute of limitations barred the action. We affirm.

I.

¶2. This case has its beginnings in the Sewerage District's construction of a deep-tunnel storm-water system in Milwaukee County. As material to the issues in this case, the District hired a joint-venture entity, "Bowles Contracting, Inc. and Tomasini Contractors, Inc.," to do the actual work on the project that affected E-L Enterprises. The parties agree that the joint venture is no longer in business.

¶3. Part of the work in connection with the Sewerage District's deep-tunnel project required that the work

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[1] The Sewerage District's notice of appeal was filed on April 11, 2008. The final judgment was entered on April 15, 2008, "Nunc Pro Tunc to March 11, 2008." We have jurisdiction nevertheless. See WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

area be kept dry. The jury found that this resulted in the draining of groundwater that was keeping the pilings of a building owned by E-L Enterprises sufficiently saturated to support the building. The jury also found that the "District's removal of groundwater from E-L's property [was] unreasonable," was "a taking," and caused E-L Enterprisers "building to settle." The trial court summed it up nicely in its written order denying the Sewerage District's post-verdict motions: "E-L persuaded the jury that the District took E-L's groundwater permanently, deliberately and for a public purpose and that E-L should be compensated for the lost groundwater and the accompanying loss in property value."

¶4. The Sewerage District does not dispute that there is sufficient evidence to support the jury's findings, other than its contention that there was no "taking" as a matter of law under either article I, section 13 of the Wisconsin Constitution or WIS. STAT. § 32.10. It also does not dispute that there was sufficient evidence for the jury to find in its answers to the special-verdict questions under the trial court's instructions that the diversion of the water, what the jury found was a "taking," was deliberate, that the diversion benefited the public, and that the removal of the water was permanent.[2]

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[2] E-L Enterprises's brief asserts that the Sewerage District does not dispute that the evidence before the jury supports these findings. The District's reply brief does not contradict this assertion. Accordingly, we take it as given. *See Charolais Breeding Ranches, Ltd. v. FPC Sees. Corp.*, 90 Wis. 2d 97, 109,

(Continued ...)

We address the Sewerage District's legal contentions in turn.

II.

¶5. This appeal presents issues of law, and although we have been assisted by the trial court's cogent analyses of the complex issues with which it had to deal, our review is de novo. *See Truttschel v. Martin*, 208 Wis. 2d 361, 364-365, 560 N.W.2d 315, 317 (Ct. App. 1997)

A. Inverse condemnation.

¶6. Article I, section 13 of the Wisconsin Constitution declares: "The property of no person shall be taken for public use without just compensation therefor." Where there has been a "taking" but the entity with condemnation power does not pay "just compensation," the property owner may seek so-called inverse condemnation under WIS. STAT. § 32.10, which, as material, provides:

> If any property has been occupied by a person possessing the power of condemnation and if the person not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the

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(... Continued)
279 N.W.2d 493, 499 (Ct. App. 1979) (matter not refuted deemed admitted).

> circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. . . . The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

The Sewerage District has the power to condemn "any real property situated in the state and all tenements, hereditaments and appurtenances belonging or in any way appertaining to, or in any interest, franchise, easement, right or privilege therein, that may be needed for the purpose of projecting, planning, constructing and maintaining the sewerage system, that may be needed for the

collection, transmission or disposal of all sewage or drainage of the district." WIS. STAT. § 200.43(1).

¶7. In determining that the Sewerage District's removal of the groundwater supporting E-L Enterprises's building was a "taking," the jury applied the trial court's instructions:

> A government agency commits a taking of property for which a court may order compensation if the following three elements are present: First, the taking must be deliberate, not accidental. Second, the property must be taken for some use that benefits the public. Third, the property must be taken permanently. If you are satisfied by the greater weight of the credible evidence, to a reasonable certainty that all three of these elements are present, you should answer [the "taking" question] yes.

The Sewerage District contends that as a matter of law its diversion of the groundwater was neither a "taking" under WIS. CONST. art. I, § 13, nor an "occupation" under WIS. STAT. § 32.10. We disagree.

¶8. The law in Wisconsin is settled that an entity with the power of condemnation may "occupy" land without physical entrance onto that land. Thus, for example, imposition of regulations that deprive a property owner of the use of his or her property is an "occupation." *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609, 621, 595 N.W.2d 730,

737 (1999) ("A `taking' need not arise from an actual physical occupation of land by the government.") (regulatory taking). Further, there may be a taking when the entity with the power of condemnation does something outside of the affected property that adversely impacts the owner's use of that property. Thus, in *Wikel v. Department of Transportation*, 2001 WI App 214, 247 Wis. 2d 626, 635 N.W.2d 213, we held that a claim for inverse condemnation was stated when the plaintiff, Debra M. Wikel, complained that the construction of a roadway by the Department of Transportation "caused `extensive cracks and other structural damages, including flooding damage' to the Wikel residence, rendering it `uninhabitable and unsaleable,' and resulting in a `total permanent taking' without just compensation," *id.*, 2001 WI App 214, ¶¶ 4, 7-17, 247 Wis. 2d at 629-630, 631-635, 635 N.W.2d at 215, 216-218.

¶9. In a decision most analogous to what we have here, *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 151, 101 N.W. 706, 708 (1904), held that the removal of a building's lateral support by the grading of a street was a compensable "taking . . . for public purposes" and, as characterized by *Dahlman v. City of Milwaukee*, 131 Wis. 427, 439-440, 111 N.W 675, 677 (1907), "not a mere consequential damage" for which there would be no remedy. Dahlman, too, held that the removal of a building's lateral support by the grading of a street was a compensable "taking." *Id.*, 131 Wis. at 436-440, 111 N.W. at 676-677. Although it is true that "mere consequential damage to property resulting from governmental action is not a taking" under WIS. CONST. art. I, § 13, *Wisconsin Power & Light Co. v.*

Columbia County, 3 Wis. 2d 1, 6, 87 N.W.2d 279, 281 (1958), the line between direct and consequential is less than sharp at the boundary, *id.*, 3 Wis. 2d at 7, 87 N.W.2d at 282 ("It is not presently necessary nor desirable to try to locate precisely the line between situations on the one hand where damage to property constitutes a taking for public use for which the constitution requires just compensation to be paid, and those other situations in which mere damage to property by a governmental agency, even though approaching destruction, is not a taking in the constitutional sense."). Nevertheless, *Wisconsin Power & Light* gives us guidance.

¶10. In *Wisconsin Power & Light*, the County relocated a county road and in the process dumped "a large amount of sand and gravel in the swamp adjacent to" Wisconsin Power & Light's electrical power line and close to one of its towers. *Id.*, 3 Wis. 2d at 3, 87 N.W.2d at 280. The sand and gravel "sank and spread and extended under the surface of the swamp, thereby displacing the muck and peat so as to create mounds of earth eight to 10 feet high above the surface of the swamp under the power line" thus twisting and essentially destroying the tower. *Ibid.* In determining that the damage was not a taking under WIS. CONST. art. I, § 13, but was rather merely consequential damage, *Wisconsin Power & Light* made the following assessment of the facts before it:

> [T]he tower had no utility, direct or indirect, to the highway project, that the county did not need or desire the tower or the land on which it rested

> and did not intend to acquire or affect either the tower or the land, that the public obtained no benefit from injuring it, that the county had no reason to anticipate that damage would result from its acts, and that the injury to the tower was purely accidental.
>
> Whatever might be the significance of any of these facts standing alone, collectively they negative a taking in the constitutional sense. We think that for presently pertinent purposes, the case is substantially the same as if one of defendant's trucks hauling the sand and gravel had accidentally collided with and demolished one of the plaintiffs automobiles on the highway. In both cases there is damage, for which the county may or may not be liable in tort, depending on such factors as negligence and sovereign immunity; but plaintiffs property is not taken for public use within the meaning of sec. 13, art. I, Wis. Const.

Wisconsin Power & Light, 3 Wis. 2d at 7, 87 N.W.2d at 282. Here, in contrast, there was evidence before the jury that indicated that the Sewerage District was aware of a potential groundwater problem in connection with buildings near the project and, indeed, had directed its contractor to be careful to avoid damage to those buildings as the result of

"removal or disturbance of groundwater, including but not limited to claims for subsidence and the loss of structure support," and specified that any such damage "shall be sustained and borne by the Contractor at his expense." Thus, unlike the situation in *Wisconsin Power & Light*, the Sewerage District had "reason to anticipate that damage would result from its acts." *See ibid.* Further, unlike the situation in *Wisconsin Power & Light*, where "the public obtained no benefit from injuring" the tower, *ibid.*, draining the groundwater facilitated the Sewerage District's construction by safeguarding the workers and the work from water flowing into the tunnel being dug. Therefore, diversion of the groundwater had "utility," *see ibid.*, to the Sewerage District project. As with the situation in *Wikel*, where we discussed *Wisconsin Power & Light* at length, *Wikel*, 2001 WI App 214, ¶¶ 8-9,247 Wis. 2d at 631-632, 635 N.W.2d at 216-217, this case is on the "taking" side of the line recognized by *Wisconsin Power & Light*. Significantly, *Wisconsin Power & Light*, upon which the Sewerage District rests much of its argument, specifically recognized the viability of the lateral-support cases: "[L]and may be `taken' by . . . removing lateral support by reducing the grade of a street so that the adjoining owner's soil slides down into the street. *Dahlman v. City of Milwaukee*, 131 Wis. 427, 438-440, 110 N.W. 479, 111 N.W. 675." *Wisconsin Power & Light*, 3 Wis. 2d at 5, 87 N.W.2d at 281.

¶11. We see no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same function — that is, supporting the structural

integrity of a building like that owned by E-L Enterprises. This is especially true because Wisconsin law already recognizes that a property owner's interest in the integrity of water may give rise to a protectable right. See *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 302-303, 217 N.W.2d 339, 350-351 (1974) (recognizing a claim for nuisance when "`[t]he withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure'") (quoted source omitted); *Price v. Marinette & Menominee Paper Co.*, 197 Wis. 25, 26-28, 221 N.W. 381, 381-382 (1928) (erection of dams across the Menominee river causing water "`to overflow and seep through the banks of said river and onto the plaintiffs land'" making the land "`flooded, water-soaked, spongy, and unfit for cultivation and dairying'" was a "taking" under the then-extant inverse-condemnation statute) (quoting from the complaint). Accordingly, we agree with the trial court that the jury's verdict supported E-L Enterprises's inverse-condemnation claims under WIS. CONST. art. I, § 13, and WIS. STAT. § 32.10.[3]

B. Damages — the joint venture.

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[3] The Sewerage District points out that during the proceedings, E-L Enterprises conceded that it did not have a claim under WIS. STAT. § 32.10, and that the trial court initially had that view as well. The Sewerage District contends that E-L Enterprises should be bound by that concession. A party's "concession" "in respect to a matter of law," however, "is binding upon neither the parties nor upon any court." *Fletcher v. Eagle River Mem'l Hosp., Inc.*, 156 Wis. 2d 165, 168, 456 N.W.2d 788, 790 (1990).

¶12. E-L Enterprises sued both the Sewerage District and the joint venture's insurance company for the damages it claimed to have sustained as a result of the deep-tunnel project near its building. As we have seen, it sought inverse-condemnation damages from the District. It also asserted negligence and nuisance claims against the District. The latter two claims against the District were dismissed and E-L Enterprises has not appealed.

¶13. E-L Enterprises's claims against the joint venture's insurer were also for negligence and nuisance. E-L Enterprises settled these claims via what both parties agree was a release authorized by *Pierringer v. Hoger*, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). "[A] *Pierringer* release operates to impute to the settling plaintiff whatever liability in contribution the settling defendant may have to non-settling defendants and to bar subsequent contribution actions the non-settling defendants might assert against the settling defendants." *VanCleve v. City of Marinette*, 2003 WI 2, ¶ 39, 258 Wis. 2d 80, 100, 655 N.W.2d 113, 123.

¶14. The crux of the Sewerage District's argument on appeal in connection with the joint venture is that the trial court should have required E-L Enterprises to have disclosed to the jury the amount of its settlement with the insurance company, and that the trial court should have put the joint venture on the verdict so the jury could have compared the respective contributions of the District and the joint venture to E-L Enterprises's damages. This, the District contends, would have prevented the danger

that E-L Enterprises would get a double recovery. There are two fatal flaws to these contentions.

¶15. First, the Sewerage District admits that it never specifically asked that the joint venture be included on the special verdict. Thus, it waived the right to assert as error that the joint venture was not on the verdict. See WIS. STAT. RULE 805.13(3) ("Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."); *D.L. Anderson's Lakeside Leisure Co. v. Anderson*, 2008 WI 126, ¶ 41, 314 Wis. 2d 560, 582, 757 N.W.2d 803, 814 (the objection must be "explicit"). Although we have the authority to disregard the waiver, *id.*, 2008 WI 126, ¶ 39, 314 Wis. 2d at 581, 757 N.W.2d at 813, we decline to do so because the jury would have had no basis from the evidence to make any apportionment; the District does not in its reply brief dispute E-L Enterprises's assertion that the District presented no evidence of the joint venture's culpability. Thus, we take that assertion as given. *See Charolais Breeding Ranches, Ltd. v. FPC Sees. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (matter not refuted deemed admitted).

¶16. Second, although, as we have seen, the joint venture agreed to be liable to the Sewerage District for damages resulting from "removal or disturbance of groundwater," the District did not pursue its cross-claim against the joint venture's insurance company seeking to recover against it for the joint

venture's potential liability to the District as a result of the groundwater diversion, even though in a letter to the trial court dated June 18, 2007, the District asserted that "the only `Taking' was done by the [joint venture]." (Capitalization in original.) *See* WIS. STAT. RULE 802.07(3) ("A pleading may state as a cross claim any claim by one party against a coparty if the cross claim is based on the same transaction, occurrence, or series of transactions or occurrences as is the claim in the original action. . . . [T]he cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant."). Had the District pursued its cross-claim, the liability of the joint venture could have been established, and, under the *Pierringer* release, the joint venture's responsibility for the damages to E-L Enterprises's building would have been imputed to E-L Enterprises. It is too late in the day for the District to complain that it did not have a chance to argue to the jury that the joint venture was responsible.

C. Damages — calculation.

¶ . The Sewerage District complains that the trial court did not determine a "date of taking" so the jury could apportion the diminution of value of E-L Enterprises's building before and after that date. The trial court instructed the jury on how it should determine E-L Enterprises's damages:

> If the government takes private property for a public use, the government must pay the owner the

> fair market value of the property that is taken. If only part of an owner's property is taken, and if taking part of the property reduces the value of the property that remains, the government must pay the difference between the fair market value of the property before the taking and the fair market value of the property after the taking.
>
> . . . .
>
> E-L contends that the fair market value of its property was reduced by the cost of repairs a purchaser would be required to perform if the building were sold. . . .
>
> In considering what is just compensation to E-L, consider whether the repairs that actually were performed were necessary, whether the cost of the repairs was reasonable and whether and by how much the need to perform such repairs would have lower[ed] the fair market value of the property in the eyes of a prospective purchaser.

E-L Enterprises asserts in its brief that the Sewerage District "does not cite to the record where it objected to" the trial court's just-compensation instruction. The Sewerage District's reply brief does not dispute this and does not point to a place in the Record where it objected to this instruction. Accordingly, it waived its right to complain on

appeal. *See* WIS. STAT. RULE 805.13(3); *Charolais Breeding Ranches, Ltd.*, 90 Wis. 2d at 109, 279 N.W.2d at 499 (matter not refuted deemed admitted). Moreover, the trial court's instruction fairly presented the issue to the jury.

¶18. First, the cost of repair, as the trial court's instruction indicated, is a factor that a prospective purchaser would consider to determine the fair market value of the property. This is why "fixer-uppers" go for less than houses that do not need extensive repairs.

¶19. Second, the jury also knew from the instruction that it had to consider the effect of the diversion of the groundwater on E-L Enterprises's property "after the taking." Significantly, unlike the traditional "takings" case, where there is a sharp "takings" demarcation, the accretion of damages in this case was, in more than one sense, fluid — they developed over time. The jury knew this, and was able to consider the evidence submitted by both E-L Enterprises and the Sewerage District. *See Milwaukee Rescue Mission, Inc. v. Redevelopment Auth. of City of Milwaukee*, 161 Wis. 2d 472, 480-481, 468 N.W.2d 663, 666-667 (1991) (jurors have a broad berth in assessing condemnation damages).

D. Damages — legal fees incurred to permit remediation of damage.

¶20. E-L Enterprises had the right to an easement for "ingress and egress" through land abutting its building. The abutting land was owned by Basil Ryan. Ryan would not let E-L Enterprises use the

easement to remediate the damage to its building caused by the diversion of the groundwater, and E-L Enterprises spent legal fees to enjoin Ryan from interfering with the repairs. The trial court permitted the jury to award those fees as part of its just-compensation instruction:

> In addition to construction and repair costs, E-L contends a purchaser would have incurred the cost of bringing a lawsuit against its neighbor, Basil Ryan, to gain access to his property adjacent to E-L's building in order to perform the repairs. The law provides that factors affecting the value of property that could influence or sway the decision of a prospective buyer should be considered in the determining [of] the fair market value of the property for purposes of determining just compensation.

The trial court's instruction is an accurate statement of the general rule that the expenditure of legal fees caused by someone causing damages are recoverable by the injured party. *See Weinhagen v. Hayes*, 179 Wis. 62, 65, 190 N.W. 1002, 1003 (1922) ("`[W]here the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expense to protect his interest, such costs and expense should be treated as the legal consequences of the original wrongful act.'") (quoted source omitted). The Sewerage District does not explain why this rule does not apply here.

Accordingly, we do not discuss further its claim of error. *See Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't*, 128 Wis. 2d 246, 255 n. 5, 381 N.W.2d 593, 598 n. 5 (Ct. App. 1985).

E. Damages — costs under WIS. STAT. § 32.28(3)(c).

¶21. WISCONSIN STAT. § 32.28(3)(c) provides that a plaintiff who succeeds with its claim under WIS. STAT. § 32.10 is entitled to "litigation expenses." As we have seen, E-L Enterprises prevailed on its inverse-condemnation claim under § 32.10, and we are affirming. Thus, the trial court did not err in awarding to E-L Enterprises its litigation expenses. Further, E-L Enterprises seeks its appellate litigation expenses under § 32.28(3)(c), and we agree that it is entitled to those expenses as well. *See Joyce v. School Dist. of Hudson*, 169 Wis. 2d 611, 618, 487 N.W.2d 41, 44 (Ct. App. 1992). Accordingly, we remand this matter to the trial court for a determination of reasonable appellate-litigation expenses.

F. Statute of limitations.

¶22. In an undeveloped argument, the Sewerage District contends that E-L Enterprisers inverse-condemnation claim was barred by the six-year statute of limitations in WIS. STAT. § 893.51(1), which declares: "Except as provided in sub. (2), an action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at

the time the wrongful taking or conversion occurs, or the wrongful detention begins."[4] Without giving us any supporting authority, the District contends that the groundwater is "personal property" under this provision. It seems to us, however, that groundwater is more akin to real property than it is to "personal property," especially because the eminent-domain chapter defines "[p]roperty" as an all-encompassing term that "includes estates in lands, fixtures and personal property directly connected with lands." WIS. STAT. § 32.01(2).

¶23. The trial court used the six-year statute of limitations that applies to actions seeking to recover for damage to "real property." *See* WIS. STAT. § 893.52 ("An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed."). A "cause of action accrues" under this section "when the evidence of injury tc property, resulting from the negligent act upon which the action is based, is sufficiently significant to alert the injured party to the possibility of a defect." *Tallmadge v. Skyline Constr., Inc.*, 86 Wis. 2d 356, 359, 272 N.W.2d 404, 405 (Ct. App. 1978) (applying predecessor provision). Thus, there is no merit to the District's contention that the trial court erroneously used a discovery rule in asking the jury whether "E-L kn[e]w, or should it have known, before June 23, 1998, that the District

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[4] WISCONSIN STAT. § 893.51(2) concerns trade secrets and is not applicable here.

had taken its groundwater." *See Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 24-25, 469 N.W.2d 595, 604 (1991) (explaining the discovery rule) (stray voltage case); *Jacobs v. Nor-Lake, Inc.*, 217 Wis. 2d 625, 633, 579 N.W.2d 254, 258 (Ct. App. 1998) (discovery rule applies to groundwater contamination case). As we have already noted, the accretion of damages in this case developed over time; the jury was thus justified in finding that the "taking" did not sufficiently bloom before the June 23rd date so as to alert E-L Enterprises that the groundwater had been diverted.[5] *See W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620, 629, 460 N.W.2d 787, 790 (Ct. App. 1990) ("For the statute of limitations to begin to run, a claim must be definitely fixed and not continuing.") (takings case under WIS. CONST. art. I, § 13).

III.

¶24. We affirm the judgment, and remand to the trial court for a determination of reasonable appellate-litigation expenses under WIS. STAT. § 32.28(3)(c).

By the Court. — Judgment affirmed and cause remanded with directions.

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[5] As we have seen, the jury answered the following special-verdict question "[n]o": "Did E-L know, or should it have known, before June 23, 1998, that the District had taken its groundwater?"

174

(2)

Supreme Court, U.S.
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No. 10-448

In the Supreme Court of the United States

E-L ENTERPRISES, INC.,

Petitioner,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent's extraction of groundwater during sewer construction on an easement next to petitioner's building caused some of the building's wood foundational piles to decay and ultimately fail. Petitioner's use of the commercial real estate was never interrupted, but repairs were required.

Does the Takings Clause of the Fifth Amendment entitle petitioner to recover from respondent the costs of repairing its building?

RULE 29.6 STATEMENT

Respondent, defendant-appellant-petitioner below, is Milwaukee Metropolitan Sewerage District, a special purpose entity organized under Chapter 200 of the Wisconsin Statutes. *See* Wis. Stat. § 200.21, *et seq.* It has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

BRIEF IN OPPOSITION 1

INTRODUCTION 1

COUNTERSTATEMENT 1

REASONS FOR DENYING THE WRIT 5

I. This Case Presents a Poor Vehicle to Consider a Federal Takings Law Issue Because E-L Based Its Claim on State Law 5

II. The Wisconsin Supreme Court Correctly Applied Settled Law. 6

III. The Wisconsin Supreme Court Did Not Construe Federal Law so as to Conflict With Other Federal or State Decisions. 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Bedford v. United States,
192 U.S. 217 (1904) 6-7

Blum v. 1st Auto & Cas. Ins. Co.,
786 N.W.2d 78 (Wis. 2010) 10

Cline v. Am. Aggregates Corp.,
474 N.E.2d 324 (Ohio 1984) 12

Collier v. Merced Irrigation Dist.,
2 P.2d 790 (Cal. 1931) 13

Dugan v. Rank,
372 U.S. 609 (1963) 9-10

Gibson v. United States,
166 U.S. 269 (1897) 6

Hensley v. City of Columbus,
557 F.3d 693 (6th Cir. 2009) 12

Hensley v. City of Columbus,
433 F.3d 494 (6th Cir. 2006) 11-12

Hensley v. City of Columbus,
No. 02-3778,
2004 WL 1152836 (6th Cir. Feb. 20, 2004) 11

Hensley v. City of Columbus,
No. 2:99-CV-888,
2007 WL 2902943 (S.D. Ohio Oct. 1, 2007) 12

International Paper Co. v. United States,
282 U.S. 399 (1931) 9, 11

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 4, 8

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 5, 7

McNamara v. City of Rittman,
838 N.E.2d 640 (Ohio 2005) 12

Sanguinetti v. United States,
264 U.S. 146 (1924) 7

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,
130 S. Ct. 2592 (2010) 10

United States v. Cress,
243 U.S. 316 (1917) 7

United States v. Kansas City Life Ins. Co.,
339 U.S. 799 (1950) 7

United States v. Lynah,
188 U.S. 445 (1903) 7

United States v. Willow River Power Co.,
324 U.S. 499 (1945) 6

Wis. Power & Light Co. v. Columbia Cnty.,
87 N.W.2d 279 (Wis. 1958) 4

Wisconsin v. Michels Pipeline Constr., Inc.,
217 N.W.2d 339 (Wis. 1974). 8, 10, 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 6, 8, 12

CAL. CONST. art. 1, § 14 13

WIS. CONST. art. I, § 13 3

STATUTES

Wis. Stat. § 893.80(4) 3

OTHER AUTHORITIES

Brief of Respondent E-L Enterprises, Inc., *E-L Enterprises, Inc. v. Milwaukee Metro. Sewerage Dist.*, 785 N.W.2d 409 (Wis. 2010) (No. 2008AP921), 2009 WL 2761575 6

RESTATEMENT OF THE LAW (SECOND) OF TORTS § 858 12-13

BRIEF IN OPPOSITION

INTRODUCTION

Petitioner E-L Enterprises, Inc. seeks review of a decision of the Wisconsin Supreme Court holding that consequential damages caused to its building by respondent's sewer construction did not amount to a taking of property. As a threshold matter certiorari is inappropriate in this case because the petition presents no important federal law issue: E-L did not press a federal takings claim in the lower state courts and addressed it only perfunctorily after the Wisconsin Supreme Court ordered the parties to brief the application of federal law; the Wisconsin Supreme Court reversed the lower courts without separately analyzing federal law. What is more, the Wisconsin Supreme Court's ruling that E-L proved only consequential damages to its building does not decide a question of federal law in a way that conflicts with any decision of this Court, a federal court of appeals, or another state court of last resort. This Court has held for over a century that consequential damages do not amount to a taking of property for purposes of the Fifth Amendment. Certiorari should be denied.

COUNTERSTATEMENT

1. This case arises from the District's construction in 1987–1988 of a near-surface collector sewer constructed for the District by an independent contractor. App. 1:5. To construct this sewer, the contractor dug a trench from the surface, installed sewer pipes, and then restored the surface. *Id.*

One portion of the sewer ran next to E-L's building. App. 1:5–6. The building, built in 1928, was constructed on wood piles—long, wooden poles driven into the ground. *Id.* at 1:6. Concrete pile caps were poured on top of the piles, and the caps provided foundational support for the rest of the building. *Id.*

The contractor constructed the sewer in the District's easement under a private alley next to the south wall of E-L's building. *Id.* at 1:5–6. Neither the contractor, the construction trench, nor the District ever entered E-L's property. *Id.* at 1:6 n.8.

When construction approached E-L's building, groundwater entered the trench and interrupted construction. *Id.* at 1:6. Beginning October 26, 1987, the contractor pumped water from the trench for 17 days in order to dry it sufficiently to allow construction to resume under safe conditions. *Id.* Groundwater measurements at the time of construction in 1987 and when the sewer was completed in 1988 showed a groundwater level reduction near E-L's building. *Id.* The levels recovered over the course of the next two years. *Id.*

In 1998, ten years after the sewer was constructed, E-L's owner began monitoring the building's settlement rate. *Id.* In 2001, E-L had an engineer examine the building's foundational piles. *Id.* E-L's engineer determined that the tops of 14 wood piles under the building's south wall (and the first piles north of each corner) had rotted and were no longer able to support the building. *Id.* To repair the problem, damaged portions of these piles were sawed off and replaced with concrete. *Id.*

The repairs ultimately cost $309,388, including attorneys' fees E-L incurred litigating with a neighbor

who obstructed the repair effort by refusing access to his adjacent alley. App. 1:7. E-L continued to lease space in the building throughout the entire period. *Id.*

2. In June 2004, E-L filed this lawsuit against the District and the insurer for the now-defunct contractor. *Id.* E-L principally pleaded negligence and nuisance claims. *Id.* It also pleaded a claim for "inverse condemnation"—effectively a takings claim under Art. I, § 13 of the Wisconsin Constitution—against the District. *Id.*

The contractor's insurer resolved E-L's negligence and nuisance claims against the contractor in a confidential agreement. *Id.* at 1:7 n.9. E-L has refused to disclose the amount it recovered in the settlement.

The trial court dismissed E-L's negligence and nuisance claims against the District under Wis. Stat. § 893.80(4), which affords governmental entities immunity from tort claims based on discretionary conduct. *Id.* at 1:7. The trial court allowed E-L to present its takings claim to a jury. App. 1:9.

The jury found that the District's removal of groundwater was unreasonable and a taking. App. 1:9–10. The special verdict asked the jury whether the District's removal of groundwater caused E-L's building to settle. App. 1:10. The jury answered "yes" and awarded E-L $309,388, the amount of the foundation repairs, plus other incidental repair costs, including attorneys' fees incurred in litigating access rights with the neighbor. *Id.* at 1:10–11.

The District appealed. *Id.* at 1:11. The court of appeals, addressing E-L's takings claim under the state

constitution only, affirmed. App. 2:1–20. It concluded that "this case is on the 'taking' side of the line recognized by *Wisconsin Power & Light* [*Co. v. Columbia County*, 87 N.W.2d 279 (Wis. 1958)]" (App. 2:10) dividing non-compensable governmental damage to property from governmental conduct that constitutes a taking of property (App. 2:7–8).

3. The Wisconsin Supreme Court reversed. The Court explained that two types of governmental conduct can give rise to a compensable taking under the Wisconsin Constitution and the Constitution of the United States—(i) physical occupations or appropriations and (ii) regulatory conduct that approximates a physical occupation because it deprives an owner of all beneficial use of the property. App. 1:14–15 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)).

As the court stated, E-L claimed only that the District physically took its property. App. 1:15–16; *see also* App. 1:16 n.15. But, as the court recognized, "It is undisputed that the Sewerage District did not physically occupy the property for which E-L seeks compensation." *Id.* at 1:33. And, as the court explained, E-L could not claim that the District's conduct deprived "E-L of all, or substantially all, of the beneficial use of its building. . . . The fact that E-L continued to lease the building throughout this entire period is alone sufficient to show that the value of E-L's building was not destroyed for all purposes." App. 1:30–31.

Because E-L proved only damage to its property caused by the District's removal of groundwater on the District's property, the court held that E-L had not demonstrated a compensable taking: "[T]he U.S. Constitution and the Wisconsin Constitution, unlike

the constitutions of other states, provide only that the property of no person shall be 'taken' for public use without just compensation; there is no mention of just compensation for property that is merely 'damaged' for public use." App. 1:25 (footnote omitted). Indeed, as the court stated, "Both the United States Supreme Court and this court have consistently recognized that 'government action outside the owner's property that causes consequential damages within' does not constitute a taking." App. 1:24 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982)). *See also* App. 1:28.

REASONS FOR DENYING THE WRIT

I. This Case Presents a Poor Vehicle to Consider a Federal Takings Law Issue Because E-L Based Its Claim on State Law.

Petitioner did not raise a federal takings law issue in the Wisconsin courts, and none was well developed there. *See* App. 1:2 n.2 ("The issue of whether the Sewerage District's conduct constituted a taking under the U.S. Constitution was not invoked, argued, or appealed below."). The Wisconsin Supreme Court interjected the federal law issue *sua sponte* when, in granting review, it ordered that "the parties' briefs shall address the following additional issue: the applicability of the United States Constitution's provisions regarding takings of property."

E-L had consistently relied only on Wisconsin law in the trial court, the court of appeals, and in opposing the District's petition for review in the Wisconsin Supreme Court. Neither the trial court nor the court of appeals considered the judgment to be one driven by federal law.

E-L's brief in the Wisconsin Supreme Court dealt with federal law only in passing. *See* Brief of Respondent E-L Enterprises, Inc. at 25-30, *E-L Enterprises, Inc. v. Milwaukee Metro. Sewerage Dist.*, 785 N.W.2d 409 (Wis. 2010) (No. 2008AP921), 2009 WL 2761575. And the Wisconsin Supreme Court simply resolved the federal-law issue in tandem with the state constitutional question, belying any claim that the case presents an important federal-law issue that deserves this Court's consideration. *See* App. 1:14–17.

II. The Wisconsin Supreme Court Correctly Applied Settled Law.

A. E-L proved only consequential damages not recoverable as a taking. This Court's Takings Clause jurisprudence has long adhered to the principle that consequential damages from non-invasive government conduct do not amount to "takings": "Operations of the Government . . . oft times inflict serious damage . . . but damage alone gives courts no power to require compensation where there is not an actual taking of property." *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945); *see also Bedford v. United States*, 192 U.S. 217, 225 (1904) (no taking where government obstruction of river alleged to cause damage that "was strictly consequential[ ] [and] was the result of the action of the river through a course of years"); *Gibson v. United States*, 166 U.S. 269, 275 (1897) (damage resulting from construction of dike "was not the result of the taking of any part of her property . . . but the incidental consequence of the lawful and proper exercise of a governmental power").

The effects of governmental conduct outside private property—like the District's conduct here—are not takings unless they result in a complete appropriation of private property. For example, "this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation." *Loretto*, 458 U.S. at 428 (citing *United States v. Lynah*, 188 U.S. 445, 468–70 (1903); *Bedford*, 192 U.S. at 225; *United States v. Cress*, 243 U.S. 316, 327–28 (1917); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809–10 (1950)).

Decaying woodpiles—the consequence of lower groundwater levels—is the only property damage or loss E-L proved. While E-L now contends that "its" groundwater was taken, it submitted no evidence of groundwater value. The proof of reduction in "market value" that E-L now argues is a proxy for groundwater value was actually proof of repair costs. As E-L told the jury, "[t]he reduction in the fair market value was what were the repairs that had to be done on this place. And the repairs that had to be done are summarized in Exhibit 51 . . . ." App. 1:19. Exhibit 51, as the Wisconsin Supreme Court correctly recognized, made obvious that E-L proved only consequential damages:

> Exhibit 51, a five-page document titled "Costs to Repair the Valley Business Center [or E-L's building]," is a comprehensive list of the repairs made to E-L's building and the costs thereof. The

> document has a "Detail" list of the repairs made, which includes "Window work," "Foundation, Interior . . . ," "Installed baseboard, etc.," "Electrical work for wall," "Wall repairs," "Demo piping, etc.," and like repairs.

App. 1:19–20 n.17.

B. The decision below and this Court's decisions are in accord. In interpreting the Fifth Amendment's Takings Clause the Court has recognized two types of compensable government conduct: (1) direct government appropriations or physical invasions of private property, and (2) non-invasive regulatory actions that force the owner to suffer a physical invasion or that substantially interfere with the property's use. *Lingle*, 544 U.S. at 537–38. E-L did not demonstrate conduct of either type.

There was no evidence of a direct government appropriation or physical invasion. The District never entered E-L's property, and no regulatory action is at issue. Nor does Wisconsin law grant E-L ownership of the groundwater removed by the District's contractor from the District's property. The controlling Wisconsin decision, *Wisconsin v. Michels Pipeline Construction, Inc.*, allows landowners free use of groundwater on their land but imposes a common-law nuisance duty not to use groundwater on their property in a way that unreasonably harms neighboring properties. 217 N.W.2d 339 (Wis. 1974). *Michels* did not create a property "right" or "interest" in a specific groundwater level; indeed, it refused to adopt the "correlative rights" doctrine of groundwater use allocation among neighboring landowners. *Id.* at 349–50. Thus, under Wisconsin law, the District's misuse of its land in violation of this duty—the most

that E-L has proved—cannot be viewed properly as a "partial" *physical taking* of E-L's property. *See* App. 1:28. E-L did not own the removed groundwater.

And, as the Wisconsin Supreme Court stated, "E-L does not claim that the Sewerage District's diversion of groundwater beneath E-L's building, which reduced the building's structural integrity, rendered E-L's building valueless. E-L cannot so claim because it is undisputed that E-L continued to lease the commercial building throughout this entire period." *Id.* at 1:34–35; *see also id.* at 1:7, 30–31.

C. E-L ignores the last half century of this Court's takings jurisprudence and relies exclusively on *Dugan v. Rank*, 372 U.S. 609 (1963), and *International Paper Co. v. United States*, 282 U.S. 399 (1931), to argue that the Wisconsin Supreme Court's decision conflicts with decisions of this Court. *Dugan* and *International Paper* both involve government appropriation of discernable water rights created by state laws materially different from the Wisconsin law at issue here.

1. *Dugan v. Rank* arose out of a reclamation project that redirected water from the Sacramento River to the San Joaquin River. The project reduced water flow on a section of the San Joaquin. San Joaquin landowners who declined the Government's offer to purchase their California-law riparian rights sued to enjoin the project. *Dugan* held that a district court had improperly enjoined the United States and officials of the United States Bureau of Reclamation from proceeding with the project.

In vacating the injunction, the Court reasoned that the only potentially available remedy was damages "to be measured by the difference in market value of

the [landowners'] land before and after the interference." 372 U.S. at 624–25. But the Court did not rule on the propriety of a water-rights takings claim, stating, "we do not in any way pass upon or indicate any view regarding the validity of respondents' water right claims." *Id.* at 626.

Even *Dugan*'s dicta are not in conflict with the Wisconsin Supreme Court's holding that E-L was not entitled to recover for a taking. As the Wisconsin Supreme Court reasoned, E-L never attempted to prove the value of diminished groundwater. App. 1:17 & 21–22. It proved only consequential damages.

Moreover, whether a property right exists is a state-law question. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2597 (2010). Wisconsin law, as discussed above, does not afford landowners an exclusive right to groundwater or a right to a certain level or amount of groundwater.* Instead, Wisconsin law affords all neighboring landowners the right to use available groundwater and subjects them to possible tort liability if their excessive use interferes with a neighbor's use. *See Michels*, 217 N.W.2d at 350–51. Nothing in *Dugan* suggests that a government en-

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* E-L's suggestion that the Wisconsin Court of Appeals' decision in this case recognized a property right in groundwater is misplaced. The Wisconsin Supreme Court's reversal of that decision deprives it of precedential effect. *See Blum v. 1st Auto & Cas. Ins. Co.*, 786 N.W.2d 78, 88–89 (Wis. 2010) (overruled court of appeals decisions have no precedential effect even on grounds not addressed by the Wisconsin Supreme Court). Moreover, the Wisconsin Supreme Court's *Michels* decision is plainly at odds with E-L's putative groundwater property right, as the Wisconsin Supreme Court explained. *See* App. 1:23–24 n.20.

tity's tortious interference with a neighbor's land use amounts to a taking. Such a holding would transform every governmental nuisance into a taking.

2. *International Paper Co. v. United States* is equally inapposite. During World War I the United States appropriated the total electric power output generated from diverting the Niagara River. 282 U.S. at 404–06. The Power Company, which was authorized by the State of New York to harness the river water, had conveyed to International Paper the right to use part of the diverted water to operate its mill. The Court held that because the Government took all of the water for its own use, it had to compensate International Paper for the loss of its right "to draw . . . 730 cubic feet per second—a right that by the law of New York was a corporeal hereditament and real estate." *Id.* at 405. E-L suffered no similar appropriation of an exclusive right to a specific amount of water.

III. The Wisconsin Supreme Court Did Not Construe Federal Law so as to Conflict With Other Federal or State Decisions.

E-L's effort to manufacture a federal law conflict from decisions of the Sixth Circuit, the Ohio Supreme Court, and the California Supreme Court is unavailing.

In *Hensley v. City of Columbus*, a federal district court had ruled that Ohio law did not afford landowners a property interest in groundwater collected in wells for residential use. The Sixth Circuit certified that question to the Ohio Supreme Court. *Hensley v. City of Columbus*, No. 02-3778, 2004 WL 1152836 (6th Cir. Feb. 20, 2004). The Ohio Supreme

Court answered that under Ohio law title to property includes a right to reasonable use of the groundwater beneath that property. *McNamara v. City of Rittman*, 838 N.E.2d 640 (Ohio 2005). It was not asked to decide the circumstances under which government appropriation or interference with that right would amount to a compensable taking of property under the Fifth Amendment. *See id.* at 646. The Sixth Circuit summarily reversed the district court's ruling and remanded for further proceedings. *Hensley v. City of Columbus*, 433 F.3d 494 (6th Cir. 2006).

On remand, the district court held that the plaintiffs' takings claims were time-barred and granted summary judgment. *Hensley v. City of Columbus*, No. 2:99-CV-888, 2007 WL 2902943 (S.D. Ohio Oct. 1, 2007). The Sixth Circuit affirmed. 557 F.3d 693 (6th Cir. 2009). Neither court considered the merits of plaintiffs' claim that the Fifth Amendment required the City of Columbus to compensate them for "dewatering" their drinking-water wells.

The inchoate takings issue that these decisions left unresolved is materially different from the one that E-L makes here. Whereas E-L claims injury caused by removal of groundwater passively surrounding its foundation piles, the Ohio plaintiffs sought compensation for the removal of groundwater captured in domestic wells for private consumption. *See McNamara*, 838 N.E.2d at 642. Ohio law, moreover, embraces the very correlative rights approach to groundwater that Wisconsin law has rejected. *Compare Cline v. Am. Aggregates Corp.*, 474 N.E.2d 324, 327 (Ohio 1984) (adopting 4 RESTATEMENT OF THE LAW (SECOND) OF TORTS § 858(1)(b)'s protection from another's "withdrawal of ground water exceed[ing] the proprietor's share of the annual supply or total

store of ground water"), with *Michels*, 217 N.W.2d at 349–51 (rejecting correlative rights rule and adopting draft RESTATEMENT § 858A, which lacked the provision included in § 858(1)(b)).

E-L's reliance on the California Supreme Court's decision in *Collier v. Merced Irrigation District* underscores the lack of a true conflict on any important federal law issue. 2 P.2d 790 (Cal. 1931). At issue in *Collier* was whether article 1, § 14 of the California constitution, which provided that private property "shall not be taken *or damaged* for public use without just compensation" (*id.* at 796 (emphasis added)), required that the defendant-irrigation district compensate the plaintiff-landowner when the district's dam eliminated the flow of stream water the plaintiff had relied on for irrigation. *Id.* at 794–96. The 79-year-old *Collier* decision thus involves application of a materially different state constitutional provision to materially different state-law property rights in the context of materially different facts.

CONCLUSION

The petition for a writ of certiorari should be denied.

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